Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MULVANEY MECHANICAL, INC.,
Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held—in conflict with decisions from this Court and the First, Ninth, and Tenth Circuits—that it is for the arbitrator, not the court, to decide whether a party was bound to arbitrate pursuant to an arbitration provision in a collective bargaining agreement, when the other party disavowed being bound by the entire agreement in any respect.

2. Whether, as the Ninth, Tenth, and District of Columbia Circuits have held, traditional contract principles of repudiation and rescission apply to collective bargaining agreements, or whether, as at least two other circuits have held, those principles are inapplicable and therefore a union's material breach and disavowal of a collective bargaining agreement does not authorize an employer to rescind the agreement—a question left open by this Court in *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionary Workers International*, 370 U.S. 254, 265 (1962).

PARTIES TO THE PROCEEDINGS

Petitioner Mulvaney Mechanical, Inc. was the plaintiff and appellee below. Pursuant to S. Ct. Rule 29.6, petitioner notes that it has no parent corporations and that no publicly traded company owns 10% or more of its stock.

Respondent Sheet Metal Workers International Association, Local 38 was the defendant and appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Mulvaney Mechanical, Inc. ("Mulvaney") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit reversing the District Court's judgment is reported at 288 F.3d 491 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court granting Mulvaney's motion for summary judgment is unreported and is reprinted at App. 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 2002. App. 1a. A timely petition for rehearing and rehearing en banc was denied on August 16, 2002. App. 34a. On November 6, 2002, Justice Ginsburg extended the time within which to file a petition for certiorari to and including December 16, 2002. App. 36a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

INTRODUCTION

This case concerns the role of the federal courts in ensuring that arbitration remain "a matter of consent, and that it * * * not be imposed upon parties beyond the scope of their agreement." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 208 (1991). The parties below, Mulvaney and respondent Sheet Metal Workers International Association, Local 38, entered into a collective bargaining agreement requiring them to arbitrate any disagreements they had about renewing, modifying, or terminating the agreement. And until the arbitral proceedings concluded, the agreement expressly prohibited the union from striking.

The union, however, did strike, and in doing so, maintained that it no longer considered itself bound by the agreement and its arbitration provisions. Not limited to mere correspondence with Mulvaney, the union's unambiguous repudiations of the collective bargaining agreement also

occurred during on-the-record proceedings in federal court and again before the National Labor Relations Board—both times with the intent of justifying the union's otherwise illegal strike. Yet when its fortunes changed, so, too, did the union's view of the collective bargaining agreement and the parties' duty to arbitrate under it. Despite having disavowed the agreement before two federal tribunals, and despite having engaged in a strike that was illegal under the agreement, the union eventually demanded arbitration under the very agreement it had, until then, considered a dead letter. Over Mulvaney's objection, the arbitrators took jurisdiction of the case and imposed a new 46-month collective bargaining agreement on the parties.

The District Court below vacated the arbitral award, agreeing with Mulvaney that the union clearly and unambiguously repudiated the collective bargaining agreement. A panel of the Second Circuit, however, reversed. The Court of Appeals held that questions of repudiation are for the arbitrators, not the court. Although acknowledging that the First, Ninth, and Tenth Circuits have held that courts should decide the question of arbitrability where the repudiation of the contract is unambiguous and implicates no expertise of the arbitrator, the panel refused to adopt the rule of its sister circuits. In doing so, the Second Circuit precipitated a conflict among the courts of appeals on an issue of great national importance directly implicating labor law's guiding principle of good faith.

In placing itself in conflict with the First, Ninth, and Tenth Circuits, the court below misapplied this Court's precedents. Indeed, the Second Circuit's rule is directly at odds with the principles this Court articulated just this Term, after the decision below, in *Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800 (Dec. 10, 2002). Thus while the multiple conflicts on the important question presented merits plenary review, this Court should at a minimum grant certiorari,

vacate the judgment below, and remand for reconsideration in light of *Howsam*.

This case also presents an opportunity for this Court to resolve the question it left open in *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionary Workers International, AFL-CIO*, 370 U.S. 254, 265 (1962): whether traditional contract principles of repudiation and rescission apply to collective bargaining agreements. The Second Circuit openly acknowledged that the federal courts of appeals "are divided" over this open question, App. 16a, with the Ninth and D.C. Circuits having decided that established tenets of contract law apply with full force to collective bargaining agreements, the First Circuit having adopted the opposite view, and different panels of the Third Circuit having come down on different sides of the ledger. This Court should grant certiorari to settle once and for all the basic question left unresolved in *Drake Bakeries*.

STATEMENT OF THE CASE

Background

Mulvaney is a sheet-metal contractor based in Danbury, Connecticut. Until 1997, Mulvaney was a member of the Associated Sheet Metal and Roofing Contractors of Connecticut, Inc. ("Association"), a multi-employer bargaining group that secured union workers for its member-employers. The Association did this by entering into a collective bargaining agreement with respondent Sheet Metal Workers International Association, Local 38.

By its terms, the collective bargaining agreement was for a period of one year, but was automatically renewed for another year unless one of the parties sought to amend or otherwise alter it. In that event, the agreement provided that its terms would remain in effect—even after the annual renewal term lapsed—until the parties mutually agreed on new terms or, if no agreement could be reached, until "inter-

est arbitration" proceedings before the National Joint Adjustment Board concluded.

In contrast to "grievance arbitration"—which resolves issues regarding the interpretation and enforcement of collective bargaining agreements—"interest arbitration" establishes new terms and conditions for future collective bargaining agreements. *See West Coast Sheet Metal, Inc.* v. *NLRB*, 938 F.2d 1356, 1357 (D.C. Cir. 1991) ("An 'interest arbitration' clause in a collective-bargaining agreement authorizes binding arbitration of deadlocks that occur during renewal negotiations."). Under the terms of the agreement, the Adjustment Board, an arbitral body comprised of equal numbers of union and employer members, could establish a new collective bargaining agreement for the parties only by unanimous vote. If, at the end of the interest arbitration, the Adjustment Board could not reach a unanimous decision, the agreement would formally terminate.

Termination had significant consequences. So long as it was in effect, the agreement between the Association and Local 38 expressly prohibited the "cessation of work by strike or lockout unless and until said [Adjustment] Board fails to reach a unanimous decision." App. 3a. By depriving both parties of their traditional economic weapons of strike and lockout until interest arbitration concluded, the agreement thus promoted industrial peace, while guaranteeing both employer and union alike certainty and continuity throughout the period of negotiation.

Local 38's Strike

With the agreement set for automatic renewal on June 30, 1997, Local 38 notified the Association several months before that point that it had elected to terminate entirely its bargaining relationship with the Association. Believing that the collective bargaining strength of the multi-employer Association was too strong, the union said that, going for-

ward, it would meet with each employer separately to negotiate the terms of individual collective bargaining agreements.

Although they met several times, Mulvaney and Local 38 failed to negotiate a new, separate collective bargaining agreement. Then on June 19, 1997, the union—adopting a "No Contract, No Work" position—threatened to strike Mulvaney if Mulvaney refused to come to terms with the union before the existing collective bargaining agreement expired on June 30, 1997. The Association, in turn, admonished the union that the collective bargaining agreement proscribed any strike until the union exhausted its rights through interest arbitration—and even then, only if the Adjustment Board failed to reach a unanimous decision establishing new terms.

Despite the clear obligation to refrain from initiating a work stoppage, the union nonetheless struck Mulvaney on July 1, 1997.

Local 38 Openly Repudiates The Agreement

In authorizing—and later defending—its otherwise illegal strike, Local 38 consistently maintained that the expiration of the agreement rendered the entire agreement, including the interest-arbitration provision, a dead letter. The union, in fact, openly repudiated the agreement in federal court just days after the strike commenced. In defending an action brought by the Association and an individual sheet-metal employer to enjoin the strike,[1] the union unequivocally took the position that it had "terminated [the collective bargaining]

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[1] Because the collective bargaining agreement expressly provided for arbitration, the Association argued that it was entitled to an injunction under this Court's decision in *Boys Markets* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), which recognized an exception to the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101. The District Court disagreed and refused to grant the injunction.

agreement under its terms * * * and [therefore] this contract ended." App. 5a-6a (quoting counsel for Local 38); *id.* 5a ("During the course of hearings on the order to show cause, counsel for Local 38 took the position that the union had terminated its contract with the Association earlier and thus the interest arbitration provision did not apply.").

Local 38 sounded the same refrain before the National Labor Relations Board. Four months after the strike began, the union filed a petition for election, seeking certification under Section 9(a) of the National Labor Relations Act as the official bargaining representative for Mulvaney's employees.[2] At a hearing before the NLRB, Mulvaney argued that 16 workers were ineligible to vote in the election because they had lost their status as "employees" by having engaged in the union's illegal strike. Yet as it did before the District Court in opposing the Association's suit to enjoin the strike, Local 38 defended its position by repudiating the collective bargaining agreement, arguing that "the agreement with Mulvaney had expired on June 30, 1997, and accordingly that the workers did not lose their employee status." App. 6a.[3]

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[2] The collective bargaining agreement between the Association and Local 38 had been a "prehire" agreement pursuant to Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f). Prehire agreements allow employers in the construction industry to negotiate and execute agreements with nonmajority unions before any workers are hired or any work is commenced. Congress thought prehire agreements essential due to the "temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry." *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 266 (1983); *see* H.R. Rep. No. 86-741, at 19 (1959) ("One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based.").

[3] Although the NLRB ultimately disqualified the votes of five workers who struck Mulvaney, it determined that Local 38

Local 38 Invokes Interest Arbitration

Local 38 then did a dramatic about-face. Despite having represented to both a federal district court and the NLRB—not to mention to Mulvaney itself—that the collective bargaining agreement was a nullity, the union turned around and requested interest arbitration before the Adjustment Board pursuant to that very same agreement the union had disavowed only months earlier. Yet by this time—five months after Local 38 first struck—Mulvaney had moved on. Having failed in its good-faith efforts to compel Local 38 to abide by the terms of the collective bargaining agreement, Mulvaney—at great expense—made a number of alternative arrangements for staffing its projects, including hiring new employees. In taking these actions, Mulvaney accepted at face value and relied on Local 38's consistent representations that it considered the collective bargaining agreement to be a dead letter.

Not surprisingly, Mulvaney therefore objected when Local 38 reversed course and petitioned for interest arbitration under the collective bargaining agreement. Mulvaney "appeared at the National Adjustment Board's hearing solely to challenge jurisdiction." *Id.* 8a. There, Mulvaney argued that the union terminated and repudiated the agreement by engaging in its illegal strike and by affirmatively disavowing the agreement in subsequent judicial and regulatory proceedings. That repudiation, Mulvaney asserted, authorized it to rescind the contract, and with it the interest-arbitration provisions. On July 1, 1998, the Adjustment Board nevertheless issued its decision, disagreeing with Mulvaney, assuming jurisdiction, and directing the parties to execute a new 46-month collective bargaining agreement.

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nevertheless received a majority of the ballots cast and therefore certified the union as the exclusive collective bargaining representative of Mulvaney's employees.

Mulvaney Files Suit To Vacate The Arbitration Award

On July 30, 1998, Mulvaney filed an action in Connecticut state court to vacate the Adjustment Board's decision, which Local 38 removed to the United States District Court for the District of Connecticut. On cross-motions for summary judgment, the District Court vacated the arbitration award, agreeing with Mulvaney that, under the traditional contract law of repudiation and rescission, the union's "conduct gave [Mulvaney] a right to rescind the [collective bargaining agreement]." App. 29a.

The Second Circuit's Decision Below

Local 38 appealed and a panel of the Second Circuit reversed. At the outset, the panel recognized, as the District Court had explained, that this Court's decision in *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers International*, *supra*, "left open the possibility that a strike by a union in contravention of the no-strike clause of an agreement might constitute such a repudiation of the arbitration provision that the employer would be justified in rescinding the entire agreement." App 15a. *See Drake Bakeries*, 370 U.S. at 265 ("We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union.").

The panel then acknowledged that its sister circuits "are divided" over the open question in *Drake Bakeries* "regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement." App 16a. On the one hand, the court observed, the Ninth and the D.C. Circuits have held that a union's breach of a no-strike clause in a collective bargaining agreement is material and entitles the employer to rescind the agreement. *Id.* (citing *Boeing Airplane Co.* v. *Aeronautical*

Indus. Dist. Lodge No. 751, 188 F.2d 356, 357 (9th Cir.), *cert. denied*, 342 U.S. 821 (1951); *United Elec., Radio & Machine Workers of Am., Local 1113* v. *NLRB*, 223 F.2d 338, 341-342 (D.C. Cir. 1955) (*Marathon Electric*), *cert. denied*, 350 U.S. 981 (1956)). On the other hand, the court noted that the First Circuit had reached the opposite result. *Id.* (citing *Trailways of New England, Inc.* v. *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees*, 343 F.2d 815, 817 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965)). And underscoring the conflict and confusion over this issue, the panel cited two cases from the Third Circuit, each taking a different view on the *Drake Bakeries* question. *Id.* (citing *Children's Rehab. Ctr., Inc.* v. *Service Employees Int'l Union, Local No. 227*, 503 F.2d 1077, 1079 (3d Cir.), *cert. denied*, 419 U.S. 1090 (1974); *United Steelworkers of Am.* v. *NLRB*, 530 F.2d 266, 280 (3d Cir.), *cert. denied*, 429 U.S. 834 (1976)).

Despite having gone to great lengths to survey this deep division among the courts of appeals, the Second Circuit purported to bypass the conflict by ruling that the question whether a union's breach of a no-strike clause authorizes an employer to rescind the contract is a matter to be decided by the arbitrator, not the court. App. 18a-19a ("We * * * hold that when, as here, there is a broadly worded interest arbitration clause, the question of whether an agreement has been repudiated is to be determined by the arbitrator."). But in attempting to avoid one circuit split, the Court of Appeals precipitated another. As the panel itself acknowledged, "[a] number of circuits have fashioned an exception to the general rule that decisions regarding repudiation are for the arbitrator." *Id.* 19a. Among those cited by the court below, the First, Ninth, and Tenth Circuits have all recognized that where a party has repudiated the agreement during the course of judicial proceedings, "the court need not defer to the arbitrators." *Id. See Jones Motor Co.* v. *Chauffeurs, Teamsters & Helpers Local Union No. 633*, 671 F.2d 38, 43-44

(1st Cir.), *cert. denied*, 459 U.S. 943 (1982); *California Trucking Ass'n* v. *Board of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275, 1282-84 (9th Cir.), *cert. denied*, 459 U.S. 970 (1982); *Reid Burton Constr., Inc.* v. *Carpenters Dist. Council*, 535 F.2d 598, 603 (10th Cir.), *cert. denied*, 429 U.S. 907 (1976).

The Second Circuit chose not to follow these decisions because it read them narrowly to apply only to situations in which the alleged repudiation occurred "directly" before the very court considering the arbitrability issue. Simply because Local 38's unambiguous, on-the-record repudiations occurred during an earlier round of federal-court litigation and then again in a parallel proceeding before the NLRB—but not "directly" before the District Court below—the Court of Appeals refused to follow the precedents from its sister circuits. The upshot of the panel's decision is that it licenses precisely the sort of opportunistic behavior Local 38 engaged in below—allowing a party to declare a collective bargaining agreement a dead letter in one forum when it is favorable to do so, but then to resuscitate the agreement in a subsequent proceeding when its fortunes change.

Mulvaney filed a timely petition for rehearing and rehearing en banc, which was denied on August 16, 2002. App. 34a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE MULTIPLE CONFLICTS OVER THE QUESTION WHETHER A COURT, OR AN ARBITRATOR, SHOULD DETERMINE THAT A PARTY HAS EXPRESSLY REPUDIATED A COLLECTIVE BARGAINING AGREEMENT.

The Second Circuit's decision in this case precipitates a split among the circuits on an important issue of federal labor

law: whether the federal courts may properly determine that one party's clear and unambiguous repudiation of a collective bargaining agreement entitles another party to rescind that agreement, or whether an arbitrator must decide that question. The Second Circuit below adopted a rule barring the federal courts from ever engaging in that inquiry, believing it to be the sole province of an arbitrator. Other circuits, however, have held that outright disavowals of the collective bargaining agreement—requiring no interpretation of the terms of the underlying agreement—place the issue squarely with the court. This Court should grant certiorari to resolve the conflict between the decision below and decisions from the other courts of appeals. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

A. The Decision Below Conflicts With Decisions From Three Circuits.

In holding that "the question of whether an agreement has been repudiated is to be determined by the arbitrator," App. 18a-19a, the Second Circuit openly acknowledged that at least three federal courts of appeals have tempered that absolute rule. "A number of circuits," the court explained, "have fashioned an exception to the general rule that decisions regarding repudiation are for the arbitrator." *Id.* 19a. (citing *Reid Burton Constr., Inc.* v. *Carpenters Dist. Council*, 535 F.2d at 603; *California Trucking Ass'n* v. *Brotherhood of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d at 1282-84; *Jones Motor Co.* v. *Chauffeurs, Teamsters & Helpers Local Union No. 633*, 671 F.2d at 43-44; *Reid Burton Constr., Inc.* v. *Carpenters Dist. Council*, 614 F.2d 698, 702-703 (10th Cir.), *cert. denied*, 449 U.S. 824 (1980)). The First, Ninth, and Tenth Circuits have all held that where one party has openly and unambiguously disavowed the collective bargaining agreement, the question of repudiation is no longer one for the arbitrator. That is because determin-

ing whether a party's express words and representations amount to a repudiation—particularly when they occur on the record during the course of judicial or administrative proceedings—"calls for the expertise of a judge, not an arbitrator." *Jones Motor Co.*, 671 F.2d at 43.

The court below, however, refused to adopt the rule articulated by its sister circuits. Attempting to limit those cases to their facts, the court concluded that the rule that a "court need not defer to the arbitrators" regarding repudiation applies only where the "alleged repudiation * * * occurred in the midst of proceedings *directly* before the district court itself." App. 19a (emphasis added). As we demonstrate below, the decisions of the First, Ninth, and Tenth Circuits are not so limited in scope. The decision below thus precipitates a clear split in the circuits that this Court should resolve.

In *Reid Burton*, the employer sued the union for damages it sustained as a result of a work stoppage that violated the no-strike clause in the parties' collective bargaining agreement. In its answer to the employer's complaint, the union unequivocally stated that it "is not a party to the aforementioned collective bargaining agreement," 535 F.2d at 600, but then subsequently changed its story and contended that, while still not a party to the agreement, it was nonetheless "bound by the provisions of the agreement" and therefore entitled to compel the employer to arbitrate its claims. *Id.* at 603. The Tenth Circuit ruled that it is for the district court, not the arbitrator, to determine whether such " 'evasive' and 'dilatory' pleading practices" constitute such a repudiation that the union should be deemed to have forfeited any right it might otherwise have to arbitration. *Id.* at 604.

The Ninth Circuit has aligned itself with the Tenth. In *California Trucking*, 679 F.2d at 1282-83, the Ninth Circuit cited *Reid Burton* in ruling that the district court properly decided for itself the issue of repudiation. There, in response to a lawsuit brought by several employers, the union had

unambiguously stated "it was not bound by the * * * collective bargaining agreement," but then later pointed to that "same agreement * * * as expressing its right to insist upon arbitration." *Id.* at 1284. Quoting from this Court's decision in *Drake Bakeries*, the Ninth Circuit ruled that " '[o]ne who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party.' " *Id.* at 1283 (quoting *Drake Bakeries*, 370 U.S. at 263 n.10). After conducting "an examination of the repudiator's manifest intent," *id.* at 1284, the Ninth Circuit concluded that the union's unqualified statements that it was not bound by the collective bargaining agreement effectively repudiated its right to arbitrate the dispute. *Id.*

The First Circuit's decision in *Jones Motor* accords with those of Ninth and Tenth Circuits and provides a cogent rationale for the rule articulated in these decisions. 671 F.2d at 42-43. Then-judge Breyer, writing for a unanimous panel of the First Circuit, distinguished between cases in which the repudiation determination requires interpreting the underlying collective bargaining agreement—such as where an employer claims that the union has "repudiated an agreement's arbitration provision by refusing to comply with" the terms of the collective bargaining agreement, *id.*—and those that do not. The former should be decided by an arbitrator, the court explained, because they "involve[] issues well suited to an arbitrator's expertise (such as what facts occurred or whether those facts, under the contract's standards, should bar arbitration)." *Id.* at 43. Where, however, the alleged repudiative actions require no interpretation of the collective bargaining agreement—such as where a party acquiesces in litigating its claims or, as here, affirmatively disavows the contract itself—"the question of whether they amount to waiver calls for the expertise of a judge, not an arbitrator." *Id.* As we explain *infra* (pp.18-20), this same rationale for demarcating the roles of courts and arbitrators articulated by then-Judge Breyer for a unanimous panel of

the First Circuit has just recently been adopted in a unanimous intervening decision of this Court authored by now-Justice Breyer. *See Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800, slip op. at 6 (U.S. Dec. 10, 2002) ("for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike").

In these decisions, the First, Ninth, and Tenth Circuits make clear that unambiguous repudiations—requiring no interpretation of the underlying collective bargaining agreement—are for the court to decide, not an arbitrator. In its decision below, the Second Circuit has placed itself squarely in conflict with its sister circuits. Local 38's repudiation of the collective bargaining agreement in this case was crystal clear. During proceedings in federal district court brought by the Association and an individual employer to halt the union's illegal strike, Local 38 unequivocally "took the position that the union had terminated its contract with the Association earlier and thus *the interest arbitration provision did not apply.*" App. 5a (emphasis added). It again reaffirmed that absolute repudiation before the NLRB. *See id.* 6a ("At the hearing Local 38 took the position that the agreement with Mulvaney had expired on June 30, 1997 * * *."). The question whether the union repudiated by clearly disavowing the collective bargaining agreement in its entirety—and the interest arbitration clause specifically—was a question for the district court to decide, not the arbitrators.

The court below was wrong in its novel suggestion that the rule articulated by the First, Ninth, and Tenth Circuits is inapplicable "where the alleged repudiation occurred not before the district court itself, but rather in separate tribunals." App. 21a. Whether in a parallel proceeding or in a proceeding immediately before the court, when one party to a collective bargaining agreement unequivocally says "I am not bound"—and reinforces that assertion with an illegal

strike—the effect is the same: repudiation. And the inquiry into whether statements made "in separate tribunals" constitute repudiation will no more "involve[] issues well suited to an arbitrator's expertise" than when those statements are made "directly" before the district court. *Jones Motor Co.*, 671 F.2d at 43. In the end, regardless of the forum in which a party unambiguously disavows a collective bargaining agreement, the question of repudiation "calls for the expertise of a judge, not an arbitrator." *Id.* at 43.

B. The Decision Below Conflicts With The Precedents Of This Court.

1. Certiorari is also warranted because the Second Circuit's decision conflicts with this Court's own precedents. *See* S. Ct. Rule 10(c). This Court has consistently held that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). *See also First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) ("arbitration is simply a matter of contract between the parties"); *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974) ("The law compels a party to submit his grievance to arbitration only if he has contracted to do so."). Equally well established is the proposition that "[t]he question of arbitrability * * * is undeniably an issue for judicial determination." *AT&T Techs.*, 475 U.S. at 649. *See Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. at 208 ("Whether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court.").

Where a party so completely repudiates a collective bargaining agreement by declaring in no uncertain terms that it no longer considers itself bound by the agreement, the contract between the parties has been fundamentally altered

and it therefore falls to the court, not an arbitrator, to decide whether at that point an order compelling arbitration would "operate without regard to the wishes of the contracting parties." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). Thus, as this Court observed in *Drake Bakeries*, even when a collective bargaining agreement contains an arbitration provision, "[o]ne who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party." 370 U.S. at 263 n.10 (quoting 6 Corbin, Contracts § 1443, at 192-193 n.34 (1961)).

Recognizing that an outright repudiation fundamentally alters the terms of a collective bargaining agreement—and that it then is for the court to determine the scope of the parties' duty to arbitrate after an express repudiation—is entirely consistent with federal labor policy and this Court's precedents. Indeed, one of the principal reasons for requiring courts, not arbitrators, to decide the threshold question of arbitrability is that "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' * * * if a labor arbitrator had the 'power to determine his own jurisdiction.' " *AT&T Techs.*, 475 U.S. at 651 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). *See also National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 850 F.2d 756, 760 (D.C. Cir. 1988) (the Supreme Court's rule favoring judicial resolution of the question of arbitrability is based on a "fear that arbitrators will tend to have an over-expansive view of their own jurisdiction"). The significance of that concern is heightened where, as here, the only party to the dispute—the union—is directly represented by members of the arbitral body. And contrary to the popular conception that federal labor law inherently favors arbitration, what the NLRA actually provides is that "[f]inal adjustment by a method *agreed upon by the parties* is * * * the desirable method for settlement of grievance disputes." 29

U.S.C. § 173(d) (emphasis added). As this Court has held, "under the NLRA arbitration is a matter of consent, and * * * will not be imposed upon parties beyond the scope of their agreement." *Litton*, 501 U.S. at 201.

Moreover, the Second Circuit's rule that all matters concerning repudiation—including those that require no interpretation of the underlying collective bargaining agreement—must necessarily be arbitrated conflicts with this Court's *Steelworkers* trilogy. *See United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960). Although those cases held that courts may not normally review the merits of an arbitration award under a collective bargaining agreement, this Court emphasized that the expertise of labor arbitrators resides "at the plant level." *Enterprise Wheel*, 363 U.S. at 596. Because arbitrators "sit to settle disputes * * * that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry," *id.*, it is not at all improper for the *court* to decide whether a party has expressly repudiated a collective bargaining agreement—an inquiry requiring no interpretation of the underlying agreement or industry custom.

2. This Court's unanimous decision in *Howsam*, decided this Term after the decision below, reaffirms that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800, slip op. at 4 (Dec. 10, 2002) (citing *First Options*, 514 U.S. at 943-946). In *Howsam*, the arbitration agreement provided that no dispute "shall be eligible for submission to arbitration where six (6) years have elapsed from the occurrence or event giving rise to the dispute." *Id.* at 2 (internal quotation and ellipses omitted). The question presented was

whether a court or an arbitrator should apply this time limitation.

In resolving that inquiry, this Court started with the well-known first principles—namely "that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Id.* at 3 (quoting *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. at 582). And while this Court recognized "a liberal federal policy favoring arbitration agreements," it emphasized that "it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' " *Id.* (quoting *AT&T Techs.*, 475 U.S. at 649) (emphasis in original).

In ultimately holding that the particular arbitration provision at issue in *Howsam* was for the arbitrators to apply, the Court—in an opinion written by Justice Breyer—emphasized that such a result made sense because those arbitrators are "comparatively more expert about the meaning of their own rule, [and] are comparatively better able to interpret and to apply it." *Id.* at 5. Just as then-Judge Breyer did in *Jones Motor Co.*, *supra*, this Court reasoned that "for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." *Id.* at 6.

The rule adopted by the decision below clearly conflicts with this Court's intervening decision in *Howsam*. While the facts in *Howsam* involved the construction of a particular provision *in* the agreement between the parties—a question for the arbitrators—that is not the case when arbitrability turns on a party's assertion in court disavowing the entire contract. The "decisionmaker" with the "comparative

expertise" to resolve such questions is the court, not the arbitrator. This Court should therefore at a minimum grant certiorari, vacate the judgment, and remand for reconsideration in light of *Howsam*.

C. The Question Presented Is Of National Importance And Should Be Decided By This Court.

The multiple conflicts presented by this petition provide a compelling basis for certiorari, but the need for plenary review is heightened still further by the important nature of the question presented. The upshot of the rule adopted by the court below is that it licenses precisely the sort of opportunistic behavior Local 38 engaged in below—allowing a union to declare a collective bargaining agreement a dead letter in one forum when it is favorable to do so, but then to resuscitate the agreement in a subsequent proceeding when its fortunes change. Such a rule undermines the "good faith" bargaining requirements that are at the heart of the National Labor Relations Act. *See* 29 U.S.C. § 158(a)(5), (b)(3). Moreover, the court's decision frustrates the need for certainty in connection with significant labor issues. *Cf. International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851, 857 (1987) (" 'The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation.' ") (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985)). The threshold question of who decides whether the parties to a collective bargaining agreement remain subject to the dispute-resolution procedures of that agreement after a purported repudiation of the entire agreement is too basic to be subject to conflicting answers in different circuits.

II. THIS COURT SHOULD ALSO GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS OVER THE QUESTION LEFT OPEN IN *DRAKE BAKERIES*: WHETHER TRADITIONAL CONTRACT PRINCIPLES OF REPUDIATION AND RESCISSION APPLY TO COLLECTIVE BARGAINING AGREEMENTS.

As the panel below recognized, this Court's decision in "*Drake Bakeries* left open the possibility that a strike by a union in contravention of the no-strike clause of an agreement might constitute such a repudiation of the arbitration provision that the employer would be justified in rescinding the entire agreement." App. 15a. And on that open question, the court noted, "the authorities are divided regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement." *Id.* The Second Circuit nevertheless purported to balk at "decid[ing] * * * to what extent traditional contract principles of repudiation and rescission apply in the labor context," because it understood that that question was for the arbitrator, not the court. *Id.* 17a. As we have demonstrated, the Court of Appeals' decision regarding arbitrability was wrong and should be reviewed by this Court. This Court should also take the opportunity presented by this case and grant certiorari to settle the basic question left open in *Drake Bakeries*.

1. In *Drake Bakeries*, the plaintiff-employer sued the union for damages, contending that a one-day work stoppage breached a no-strike clause in the parties' collective bargaining agreement. 370 U.S. at 256. The union moved to stay the litigation, arguing that the employer's damages claim was subject to the agreement's comprehensive arbitration provision. The employer maintained that it no longer had a duty to arbitrate its claim because of the "union's violation of the no-strike clause" and that "the faithful observance of the no-

strike clause by the union is a condition precedent to the employer's duty to arbitrate." *Id.* at 261.

This Court granted certiorari, limited to "[t]he sole question * * * whether the District Court was correct in holding that the employer's claim was an arbitrable matter under the contract and in ordering a stay of the action pending completion of arbitration." *Id.* at 255. Rejecting the employer's argument that a strike in violation of a no-strike clause *necessarily* discharges an employer's duty to arbitrate, this Court observed that it "has prescribed no such inflexible rule rigidly linking no-strike and arbitration clauses of *every* collective bargaining contract in *every* situation." *Id.* at 261 (emphases added).

Although refusing to recognize an employer's absolute right to avoid arbitration whenever a union violates a no-strike clause, this Court in *Drake Bakeries* expressly left open the broader question whether it is ever appropriate to apply traditional contract principles of rescission and repudiation to collective bargaining agreements:

> We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union. [*Id.* at 265.]

This Court had no occasion to consider that broader question in *Drake Bakeries*, because the employer there never "attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the arbitration provisions," *id.* at 261, but instead simply sued for damages. On those facts, this Court found "no circumstances in th[e] record which justify relieving the company of its duty to arbitrate the consequences of this one-day strike,

intertwined as it is with the union's denial that there was any strike or any breach of contract at all." *Id.* at 265-266.

2. Since *Drake Bakeries* was decided, the federal courts of appeals remain hopelessly conflicted over the question left unresolved there. As the panel below recognized, "the authorities are divided regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement." App. 16a. In addition to the Ninth and D.C. Circuits—whose pertinent decisions the court below cited—the Tenth Circuit has also taken the view that a material breach of a collective bargaining agreement can excuse the non-breaching party from a corresponding duty under the agreement. *See Boeing Airplane Co.* v. *Aeronautical Indus. Dist. Lodge No. 751*, 188 F.2d at 357; *Marathon Electric*, 223 F.2d at 341-342; *NLRB* v. *Northeast Okla. City Mfg. Co.*, 631 F.2d 669, 677 (10th Cir. 1980). The First Circuit, however, has taken a different path, *see Trailways of New England, Inc.* v. *Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees*, 343 F.2d at 817, while the Third Circuit, locked in an apparent intra-circuit split, has at various times adopted both positions. *Compare Children's Rehab. Ctr., Inc.* v. *Service Employees Int'l Union, Local No. 227*, 503 F.2d at 1079 (union's breach of no-strike clause entitled employer to rescind collective bargaining agreement), *with United Steelworkers of Am.* v. *NLRB*, 530 F.2d at 280 ("doctrine of material breach derived from contract law is inconsistent with contemporary national labor policy").

In *Marathon Electric*, 223 F.2d at 341, the D.C. Circuit held that the "general law that one party to a contract need not perform if the other party refuses in a material respect to do so" is a "rule [that] applies to labor contracts." There, after the union staged a walkout in clear violation of the no-strike clause in the parties' collective bargaining agreement, the employer "elected to rescind and thereupon formally terminate[] the agreement." *Id.* Far from suggesting—as the

panel below did, App. 2a—that traditional contract principles of rescission and repudiation are inconsistent with federal labor law, the D.C. Circuit emphatically ruled that "in cases where the breach is a strike in violation of a collective bargaining agreement, * * * application of the rule [regarding rescission and repudiation] is *supported by* the rationale underlying such agreements." *Marathon Electric*, 223 F.2d at 341 (emphasis added). That is because "prevention of strikes is one of the principal purposes of labor contracts and of the [National Labor Relations] Act." *Id. See also id.* ("A no-strike provision is 'The chief advantage which an employer can reasonably expect from a collective labor agreement.' " (quoting S. Rep. No. 80-105, at 16 (1947)). Applying these traditional contract principles, the District of Columbia Circuit concluded that the union's "walkout was a material breach which justified the subsequent rescission of the contract by the Company." *Id.*[4]

Similarly, in *Boeing Airplane*, 188 F.2d at 357, the Ninth Circuit held that, by violating a no-strike clause, the union committed a material breach, entitling the employer to exercise its "right of rescission" and thereby terminate the entire contract. The court explained that traditional tenets of repudiation and rescission are fully applicable to collective bargaining agreements and that "[t]he power of termination

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[4] As the District Court did in this case, App. 31a-32a, other federal district courts have adopted the rule articulated in *Marathon Electric*. *See, e.g., United Steel Workers of Am.* v. *Rome Indus.*, 321 F. Supp. 1170, 1175 (N.D. Ga.) (citing *Marathon Electric* and recognizing that, because "the quid pro quo of any collective bargaining agreement is the 'no strike' for 'arbitration' clauses * * * a strike may sometimes constitute such a repudiation as to justify re[s]cission by the company"), *aff'd in part*, 437 F.2d 881 (5th Cir. 1970); *Local Joint Executive Bd., Hotel & Rest. Employees & Bartenders Int'l Union* v. *Nationwide Downtowner Motor Inns, Inc.*, 229 F. Supp. 413, 416-417 (W.D. Mo. 1964) (citing *Marathon Electric* and *Boeing Airplane*).

which accrues to the wronged party as a result of such a breach" of a collective bargaining agreement "leaves neither party with any basis thereafter to complain of the conduct of the other as a breach of the contract." *Id.*

In *NLRB* v. *Northeast Oklahoma City Manufacturing Co.*, *supra*, the Tenth Circuit sided with the Ninth and D.C. Circuits in applying traditional contract principles to collective bargaining agreements. There, it was the union that claimed that an employer's actions—persistent delays in making bonus payments—"constituted a material breach of the collective bargaining agreement, excusing the employees from their obligation under the no-strike provision." Citing the D.C. Circuit's decision in *Marathon Electric*, the Tenth Circuit agreed. *See* 631 F.2d at 677 ("the Board, therefore, properly found a material breach excusing performance here"). Just as the court in *Marathon Electric* held that applying established doctrines of material breach and rescission to collective bargaining agreements "support[s] * * * the rationale underlying such agreements"—since "prevention of strikes is one of the principal purposes of labor contracts," 223 F.2d at 341—so, too, the Tenth Circuit explained that a repeated "failure to issue paychecks * * * was a material breach of the employer's basic and fundamental obligation to pay agreed-upon wages when due, of a character sufficient to excuse the employees' resort to strike action in disregard of the contractual grievance and no-strike provisions." *Id.* (quotation and brackets omitted).[5]

In conflict with the decisions of the Ninth, Tenth, and D.C. Circuits, the First Circuit has ruled that an employer is never "justified in rescinding the collective bargaining agreement"

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[5] As the decisions from the Ninth, Tenth, and D.C. Circuits illustrate, applying traditional contract principles to collective bargaining agreements is neither pro-employer nor pro-union; both constituencies have effectively invoked the doctrines of repudiation and rescission.

based on a union's breach of a no-strike clause. *Trailways of New England, Inc.* v. *Amalgamated Ass'n of Street Elec. Ry & Motor Coach Employees of Am., AFL-CIO*, 343 F.2d at 817. The court in *Trailways* reasoned that such an absolute rule was dictated by this Court's decision in *Local Union No. 721, United Packinghouse, Food & Allied Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964), a case decided two years after *Drake Bakeries*. The *Needham* decision, however, did not purport to answer the question left undecided by *Drake Bakeries*; as the court below acknowledged, that question is still an open one. App. 15a-16a. In fact, *Needham* simply reaffirmed the holding in *Drake Bakeries* that, while not *every* breach of a collective bargaining agreement will repudiate the agreement, there are situations in which it will and " 'in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important.' " *Needham*, 376 U.S. at 252 (quoting *Drake Bakeries*, 370 U.S. at 262-263). Based on a flawed understanding of *Needham*, the First Circuit's decision in *Trailways* squarely conflicts with those of the Ninth, Tenth, and D.C. Circuits.

Underscoring the conflict and lingering confusion over the *Drake Bakeries* question, two different panels of the Third Circuit have resolved that question in two very different ways. In *Children's Rehabilitation Center, Inc.* v. *Service Employees International Union, Local No. 227*, *supra*, a divided panel of the Third Circuit sided with the Ninth and D.C. Circuits and cited their decisions in *Boeing Airplane* and *Marathon Electric* "as a precedent for the recognition of [the] power [of rescission] where a labor contract has been breached by a prohibited strike." 503 F.2d at 1079. In doing so, the court recognized that, while both *Drake Bakeries* and *Needham* rejected the view that breach of a no-strike clause "ipso facto relieve[s] the employer of the complex of legal obligations that the contract has imposed upon it," those

"cases do *not* reach the question whether such a breach could empower the employer * * * unilaterally to abrogate the entire labor contract." *Id.* at 1079 (emphasis added). To resolve that open question, the Third Circuit looked to traditional principles of contract law:

> That remedy [of repudiation] for material breach of a contract was available at common law "at the option of the injured party, and it should be, and in general is allowed * * * for *any* breach of contract of so material and substantial a nature as would constitute a defense of an action brought by the party in default for refusal to proceed with the contract." [*Id.* (citing 12 Williston, Contracts 186 (3d ed. 1970)) (emphasis added).]

The court thus concluded that the common-law doctrines of repudiation and rescission should continue to apply as federal courts "shap[e] a national common law of labor relations." 503 F.2d at 1078.

In *United Steelworkers*, *supra*, however, a subsequent panel of the Third Circuit retreated from *Children's Rehabilitation Center*, and in doing so, expressly rejected the decision of the D.C. Circuit in *Marathon Electric*. 530 F.2d at 279-280. The *United Steelworkers* panel explained that "we believe that strict application of the doctrine of material breach derived from contract law is inconsistent with contemporary national labor policy." *Id.* at 280. In reaching that conclusion, the court reasoned that " '[a] collective bargaining contract is made to be broken' " because "[t]he number of people involved, both as employees and as supervisors, makes large and small violations inevitable,' " and that therefore traditional contract rules should not apply; otherwise, " '[t]here will be no rules to govern the enterprise if the contract is set aside.' " *Id.* (quoting Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 18-19 (1958)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's intervening decision in *Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800 (Dec. 10, 2002).

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MULVANEY MECHANICAL, INC.,
Plaintiff-Appellee,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,
Defendant-Appellant.

Docket No. 00-7546

Argued December 12, 2000
Decided April 24, 2002

Before FEINBERG, CARDAMONE, and F.I. PARKER, Circuit Judges.

CARDAMONE, Circuit Judge.

Plaintiff Mulvaney Mechanical, Inc. (Mulvaney, employer, or company) brought suit to vacate an arbitration award that required it as an employer to execute a new collective bargaining agreement with defendant, the Sheet Metal Workers International Association, Local 38 (Local 38, union, or appellant). Mulvaney had contracted originally with Local 38 through a multi-employer bargaining group, until the union decided in 1997 that it preferred to bargain with the employers individually. Local 38 and Mulvaney thereafter attempted to negotiate a new labor contract but,

when they reached an impasse, the union authorized a strike upon the expiration of the existing collective bargaining agreement (agreement). Several months after the commencement of the work stoppage, Local 38 invoked the agreement's interest arbitration provision so that an arbitration panel could establish the terms of a new contract between it and the employer, thereby precipitating the present litigation.

On this appeal we deal with the issue of whether a breach by a union of a no-strike clause in a collective bargaining agreement repudiated that agreement and thereby justified the employer in rescinding the entire agreement. The doctrine in contract law that a material breach by one party to a contract constitutes such a repudiation as to justify the other party's unilateral rescission of the entire contract is not a legal concept that readily is transposed into the context of national labor law—as though the notion "one size fits all" applies in the law. On the contrary, in labor law there are other policies to consider, in particular the strong presumption in favor of arbitrability, which in this case preclude giving the employer the right to terminate the collective bargaining agreement solely on account of the union's breach.

BACKGROUND

Up until 1997 Mulvaney, a Connecticut-based sheet metal contractor, was a member of a multi-employer bargaining group, the Associated Sheet Metal and Roofing Contractors of Connecticut, Inc. (Association). The Association secured workers for its member-employers by contracting with appellant, Local 38. The collective bargaining agreement between the Association and Local 38 was for a term of one year, but was automatically renewed on an annual basis unless a party requested that it be reopened. Article XIV of the agreement provides that if a party should elect to reopen

the agreement at the end of the yearly term, the agreement should nevertheless remain in effect until the conclusion of "interest arbitration" before the National Joint Adjustment Board (National Adjustment Board or Board), an arbitration board comprised equally of employer and union members. "Interest arbitration" involves referring a dispute to an arbitration panel in order for it to establish the terms and conditions of a future collective bargaining agreement. It differs from the more typical grievance arbitration, which involves interpreting an existing employment contract to determine whether its conditions have been breached. *See Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers' Ass'n*, 853 F.2d 506, 509 n.6 (7th Cir. 1988).

Article X, Section 8 of the agreement delineates the interest arbitration procedures to be followed upon the failure of the parties to negotiate the renewal of the existing contract. That section also prohibits the parties from engaging in a work stoppage, unless and until the National Adjustment Board formally notifies the parties that it was unable to reach a unanimous compromise decision:

> [A]ny controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:
>
> ....
>
> The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties .... There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received a written notification of its failure.

The Strike by Local 38

By letter of January 8, 1997 Local 38 informed the Association that the agreement between them was due to expire six months later on June 30, 1997 and that the union had elected to terminate its bargaining relationship with the multi-employer Association as of that date. This letter satisfied the requirement of § 8(d)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d)(1) (1994), that required Local 38 to give Mulvaney at least 60 days advance notice of its intention to modify or terminate the agreement. The union planned thereafter to negotiate exclusively with the Association's individual member employers. As required by § 8(d)(3) of the NLRA, 29 U.S.C. § 158(d)(3), Local 38 sent a "Notice to Mediation Agencies" on January 21, 1997, apprising both the Federal Mediation and Conciliation Service and the New York State Employment Relations Board of its intention to terminate the collective bargaining agreement. Unfortunately, the union's notice identified the Association as the relevant party to the dispute rather than the individual employer, even though both parties had agreed to negotiate on an individual basis. In addition, the union failed to notify in a timely fashion the Connecticut Board of Mediation and Arbitration, which it was required to do since the Board qualified under the NLRA as a "State . . . agency established to mediate and conciliate disputes within the State . . . where the dispute occurred." *Id.*

Local 38 thereafter met with individual employers regarding the terms of a new collective bargaining agreement. It negotiated unsuccessfully with Mulvaney between May and June 1997. On June 19, 1997 the union informed Mulvaney that the employer's latest proposal was unacceptable, that the employees' position was "No Contract, No Work," and that Mulvaney would be subject to a work stoppage if the parties did not reach an accord prior to the June 30th expiration of

the agreement. The Association, responding for its member employers, reminded Local 38 of the interest arbitration provision of the agreement and of the union's obligation not to strike until the National Adjustment Board deadlocked following a petition by the parties.

On June 25, 1997 Local 38 informed its members that the negotiations with the employers had failed and that a strike was authorized for July 1, 1997, one day after the expiration of the agreement. On July 1, 1997 members of Local 38 struck several sheet metal contractors, including Mulvaney, where six union members failed to report for work.

Related Proceedings Following the Work Stoppage

Although Local 38 and Mulvaney continued to negotiate the conditions of a renewal agreement during the work stoppage, Mulvaney hired nine workers to replace its striking employees and allegedly ceased to honor the terms of the expired agreement. On July 2, 1997 the Association brought suit in the United States District Court for the District of Connecticut (Covello, J.) in an unsuccessful attempt to enjoin the strike and enforce the interest arbitration provision of the agreement. During the course of hearings on the order to show cause, counsel for Local 38 took the position that the union had terminated its contract with the Association earlier and thus the interest arbitration provision did not apply:

> We terminated [the collective bargaining] agreement under its terms, and under the terms of article 14 even, it says that . . . if there's an article 10 section 8 provision in the contract, which there was, it would go to the [National Adjustment Board], which is the normal course of events.
>
> But not in this case, because there are no negotiations for a renewal agreement, so article 10 section 8 does not ap-

> ply. What does apply is the termination notice which we gave in January, and this contract ended two days ago, or three days ago.

Local 38 took a similar position when it filed a petition for election with the National Labor Relations Board (NLRB) on October 30, 1997. Until the petition, Mulvaney's employees had maintained their relationship with Local 38 under § 8(f) of the NLRA, 29 U.S.C. § 158(f) (1994). That section provides that only in the building and construction industry may an employer enter into a collective bargaining agreement with a union even though the union has not been elected as a bargaining unit by a majority of the employer's workers. *See id.* At the conclusion of the term of the agreement, both the employer and the union can unilaterally repudiate the § 8(f) bargaining relationship. *See John Deklewa & Sons,* 282 N.L.R.B. 1375, 1377-78 (1987), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988). Local 38's election petition sought to certify the union under § 9 of the NLRA, 29 U.S.C. § 159 (1994), as the official bargaining representative for Mulvaney's employees; once certification under § 9 is in place that relationship cannot be repudiated unilaterally. *See id.* § 158(a)(1), (a)(5).

After the union's representation election, a hearing was held on January 29, 1998 before an NLRB hearing officer regarding Mulvaney's claim that 16 workers were ineligible to vote in the election because they had lost their status as "employees" following the strike. *See id.* § 158(d). At the hearing Local 38 took the position that the agreement with Mulvaney had expired on June 30, 1997, and accordingly that the workers did not lose their employee status under § 8(d) of the NLRA. *See id.*

On April 24, 1998 the hearing officer issued a report which found that the agreement was still in effect at the time of the

strike, that Local 38 failed to fulfill the notice requirements of § 8(d)(3) of the NLRA and, as a result, five of Mulvaney's striking workers were ineligible to vote in the representation election. The hearing officer further found that Mulvaney had failed to prove that 11 other workers had participated in the strike and thus held that the challenged ballots of these workers should be added to the election's vote tally.

On October 14, 1998 the NLRB ruled that Local 38 had received a majority of the ballots cast in the representation election and certified that union as the exclusive collective bargaining representative of Mulvaney's employees. Mulvaney has since refused to bargain with Local 38—purportedly in an attempt to challenge the NLRB's certification—but in a May 6, 1999 decision, the NLRB found that Mulvaney's failure to recognize the union constituted an unfair labor practice. *Mulvaney Mech., Inc.*, 328 N.L.R.B. No. 46, 1999 WL 298517, at *2 (N.L.R.B. May 6, 1999). We have since granted a petition to enforce that decision. *NLRB v. Mulvaney Mech., Inc.*, 99-4176, 234 F.3d 1262, 2000 WL 1715231, at *3 (2d Cir. Nov.14, 2000) (summary order). Mulvaney is therefore obligated to bargain with Local 38 as its employees' official bargaining representative.

The distinct issue on this appeal is whether Mulvaney is bound by the terms of an existing labor agreement to execute the specific collective bargaining agreement that the National Adjustment Board has awarded in arbitration.

The Present Dispute

Despite the previous representations that the agreement had expired, Local 38 on November 25, 1997 invoked the interest arbitration provision, Article X, § 8, to request that the National Adjustment Board assume jurisdiction over negotiations between the union and Mulvaney. The employer objected to arbitration arguing that Local 38 had terminated

the agreement—including the interest arbitration provision—by its July 1, 1997 strike. The employer appeared at the National Adjustment Board's hearings solely to challenge jurisdiction. The Board nevertheless assumed jurisdiction, and on July 1, 1998 directed the parties to execute a 46 month collective bargaining agreement, effective immediately, incorporating the same terms as Local 38's "building trades" collective bargaining agreement.

On July 30, 1998 Mulvaney filed an action in Connecticut state court to vacate the arbitration award, primarily on the ground that the Board acted without jurisdiction. Local 38 removed this action to the United States District Court for the District of Connecticut (Chatigny, J.), basing federal question jurisdiction on § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1994). In July 1999 the parties cross-moved for summary judgment, with the employer seeking to vacate the arbitration award and Local 38 seeking to enforce the award.

In a March 31, 2000 order the district court vacated the Board's award as extra jurisdictional. It held that Local 38's strike constituted a repudiation of the agreement and that Mulvaney was thereby entitled to rescind the contract, including the interest arbitration provision. *See Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38,* No. 3:98CV1750 RNC, 2000 WL 852430, at *3-*4 (D.Conn. Mar.31, 2000). From this order, Local 38 appeals.

DISCUSSION

We review the district court's grant of summary judgment *de novo. Morales v. Quintel Entm't, Inc.,* 249 F.3d 115, 121 (2d Cir. 2001). Such relief is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The underlying inquiry when reviewing

such a grant is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Local 38 contends on appeal that the district court's grant of summary judgment vacating the arbitration award was error. Mulvaney counters that summary judgment was appropriate because the Board acted extra-jurisdictionally. Specifically, Mulvaney contends that the Board derived its authority solely from the interest arbitration provision of the agreement, and that either of two alternative grounds supports a finding that the agreement had terminated prior to its assumption of jurisdiction.

Initially, the company asserts the strike by the union—in violation of the no-strike clause of the collective bargaining agreement and in contravention of § 8(d) of the NLRA—*ipso facto* terminated the agreement. In the alternative, the employer insists the strike, coupled with the union's later pronouncements that the collective bargaining agreement had been terminated, constituted a repudiation of the agreement. This repudiation, Mulvaney's argument concludes, gave it the option of rescinding the agreement, an option that it exercised.

I The Strike Did Not *Ipso Facto* Terminate the Agreement

Under the terms of the interest arbitration provision of the agreement, the parties are prohibited from resorting to a work stoppage upon the expiration of the collective bargaining agreement, unless and until formal notification by the Board that it has failed to reach a unanimous decision. Local 38 admits that it failed to comply with the mandates of this no-strike provision. Moreover, we recognize that the strike contravened § 8(d)(3) of the NLRA, 29 U.S.C. § 158(d)(3),

because the union failed, for example, to provide timely notification to the Connecticut Board of Mediation and Arbitration prior to engaging in the work stoppage. Mulvaney alleges that these two transgressions by the union—the strike and the failure to give notice ahead of time to the appropriate mediation agencies—operated in tandem to terminate the agreement *ipso facto* when the strike began.

A. *Notice Requirements*

Section 158(d) of the NLRA states in pertinent part

> [T]he duty to bargain collectively shall also mean that no party to [a collective bargaining agreement] shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> ....
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time.

29 U.S.C. § 158(d). The section further provides that "[a]ny employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, . . . but such loss of status for such employee shall terminate if and when he is reemployed by such employer." *Id.*

The employer maintains that Local 38's failure to notify the proper mediation authorities in a timely manner and to abstain from a work stoppage for a 60 day period from the

date of notification, *see* § 158(d)(4), resulted in the loss of employee status for the striking workers under § 158(d). Since all of the union members employed by Mulvaney struck the employer—and in turn allegedly lost their employee status—the employer avers that Local 38's support of the strike resulted in the forfeiture of its status as the union representative of Mulvaney's employees. The company further declares that this loss of bargaining agent status led to the termination of the collective bargaining agreement because one of the parties to that agreement, *i.e.*, Local 38, had "judicially 'died.' "

In making this argument, Mulvaney primarily relies upon the D.C. Circuit's 1949 decision in *Boeing Airplane Co. v. NLRB*, 174 F.2d 988 (D.C.Cir. 1949). In that case the union entered into an agreement with Boeing that contained a clause perpetuating the existing contract until a new agreement could be "reached by the parties either through negotiation or arbitration." *Id.* at 989. Despite this arbitration clause, the D.C. Circuit held that the union, having violated the notice provisions of § 8(d) and a no-strike clause in its contract, forfeited its "right to be considered as a collective-bargaining agent for the employees of the Company." *Id.* at 991. While we recognize that Local 38's illegal strike may have, for similar reasons, caused its members to lose their employee status, we decline to follow *Boeing* to the extent that it would compel us to hold that this loss of employee status necessarily terminated the collective bargaining agreement with the union. First, even if it is assumed that the union lost its status as the majority representative, the interest arbitration clause would not have become a dead letter. As in *American Metal Products, Inc. v. Sheet Metal Workers International Ass'n, Local Union No. 104*, 794 F.2d 1452 (9th Cir. 1986), the collective bargaining agreement here purports to cover the "rates of pay and conditions of employment for *all employees*" and "does not require as a

precondition to new contract negotiations an NLRB finding of an appropriate bargaining unit . . . or *majority support of the Union*." *Id.* at 1455 (emphases added). As such, even without the striking union members in the company's employ, the union's status as the collective representative of the remaining employees had not, under the collective bargaining agreement, "judicially 'died.' " In other words, even though the § 8(d) violation had a potentially devastating impact on the union employees, the immediate effect of the strike, given the language of the agreement in this case, did not make the union simply disappear. If, however, in the course of the union's representation, Mulvaney believes it "committed an unfair labor practice, [the employer] is free to file a complaint with the NLRB." *Id.*

Importantly, contrary to the above assumption, it is entirely conceivable that Mulvaney's bargaining relationship with Local 38 as the majority representative would continue even if all of the company's union employees were discharged. In the context of a dispute over whether a union maintained the majority of support of a unit of employees, the Supreme Court has upheld the NLRB's "no-presumption approach" to strike replacement workers. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-89 (1990). This approach rejects the assumption that replacement workers and strike crossovers ordinarily oppose the striking union; instead it insists that whether the union continues to enjoy the majority support of the employer's workers should be determined on a case-by-case basis. *See id.* at 781-82. *Curtin Matheson* premised its approval of the NLRB's approach, in part, on the notion that an anti-union presumption would countenance attempts by employers to rid themselves of union representation following a strike. *See id.* at 794-95. Adopting the no-presumption approach limits an employer's opportunity to use the strike as a vehicle to terminate the bargaining relationship. As such, this approach "serves the policies of

promoting industrial stability and negotiated settlements." *Id.* at 795.

Mulvaney hired nine replacement workers during the course of Local 38's strike. A holding that the loss of employee status of the striking union workers terminated the collective bargaining agreement would necessarily assume that these replacement workers did not want to be associated with the union, which would be inconsistent with the no-presumption approach approved in *Curtin Matheson. See generally* Michael H. LeRoy, *Strike Crossovers and Striker Replacements: An Empirical Test of the NLRB's No Presumption Policy,* 33 Ariz. L.Rev. 291, 320-31 (1991) (finding empirical support for NLRB's no-presumption policy). In fact, as factual support for the no-presumption approach in this case, we repeat that on October 14, 1998 the NLRB found that Local 38 had received a majority of the ballots cast in a post-strike representation election and certified the union as the exclusive bargaining representative of Mulvaney's employees under § 9 of the NLRA, 29 U.S.C. § 159. Consequently, the alleged loss of employee status of Mulvaney's workers did not necessarily terminate the bargaining relationship between the employer and the union.

Finally, even if the strike had dissolved the bargaining relationship between Mulvaney and Local 38, we are not persuaded that the collective bargaining agreement was terminated automatically. It is settled that when a union which is a party to an existing collective bargaining agreement is decertified, the successor union is not necessarily bound by the terms of the unexpired labor contract. *See NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 284 n. 8 (1972); *see also Am. Seating Co.*, 106 N.L.R.B. 250, 255, 1953 WL 10942 (1953) (establishing this rule). Yet, Mulvaney fails to direct us to any authority holding that such termination of the agreement is automatic, rather than at the

prerogative of the incoming union. Our precedents indicate it is not automatic. *See Abrams v. Carrier Corp.*, 434 F.2d 1234, 1244 (2d Cir. 1970).

In *Abrams,* we expressed disapproval of the lower court's reliance on the NLRB's decision in *American Seating* for the proposition that the certification of a successor union automatically terminated a pre-existing collective bargaining agreement. As we held in *Abrams*

> *American Seating* simply held that it was an unfair labor practice for an employer to refuse to bargain with a newly certified union upon the ground that it was bound by a prior contract with a former bargaining representative. It does not follow from this reasoning that until a new agreement is reached with a new bargaining representative, the old agreement, or at least those portions thereof necessary for the continuation of the employer-employee relationship, automatically ceased to exist . . . .

Id. Because we are not convinced that the alleged cessation of the bargaining relationship between Mulvaney and Local 38 would have automatically terminated the agreement—rather than simply render the contract voidable—we reject the employer's argument in support of *ipso facto* termination.

B. *Strike in Violation of the No Strike Clause*

The company's second argument that the union's strike in violation of the agreement's no-strike clause, Article 10, § 8, terminated the agreement also fails to carry the day. In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers International*, 370 U.S. 254, 261-63 (1962), the Supreme Court rejected an employer's assertion that a strike by a union in violation of the no-strike clause of a collective bargaining agreement excused the employer from

its arbitration obligations under that agreement. Mulvaney attempts to distinguish *Drake Bakeries* on the grounds that the employer in that case had only sought to avoid arbitration of a singular issue, and had not claimed the contract had been repudiated as a whole. *See id.* at 261, 82 S.Ct. 1346 ("The company has not attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the arbitration provisions.").

In *Local Union No. 721, United Packinghouse, Food and Allied Workers v. Needham Packing Co.*, 376 U.S. 247, 251 (1964), the Supreme Court instructed that *Drake Bakeries* should not be limited to its particular facts. *Needham Packing* expressed the view that although *Drake Bakeries* "relied in part on the employer's apparent intention not to terminate the contract altogether, more central to its conclusion was the view that there was no 'inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation.'" *Id.* (quoting *Drake Bakeries*, 370 U.S. at 261; *see also Ice Cream Drivers & Employees Union Local 757 v. Borden, Inc.*, 433 F.2d 41, 45 (2d Cir. 1970) (holding that *Drake Bakeries* and *Needham Packing* stand for proposition that "arbitration rights are not necessarily forfeited by the breach of a no-strike clause"). Mulvaney's contention that its duty to arbitrate necessarily ended when the union breached the no-strike clause of the agreement therefore fails.

II The District Court Acted Beyond Its Authority

Drake Bakeries left open the possibility that a strike by a union in contravention of the no-strike clause of an agreement might constitute such a repudiation of the arbitration provision that the employer would be justified in rescinding the entire agreement. *See* 370 U.S. at 265 ("We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other

contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union."). Following this lead, the district court found that the employer had properly rescinded the collective bargaining agreement after Local 38 repudiated the arbitration clause by calling a strike. *See Mulvaney Mech.*, 2000 WL 852430, at *3-*4.

The trial court found further support for its holding in *United Electrical, Radio and Machine Workers of America, Local 1113 v. NLRB*, 223 F.2d 338, 341-42 (D.C.Cir. 1955) (*Marathon Electric*), where the District of Columbia Circuit held that a union's strike in violation of both the no-strike clause of a collective bargaining agreement and § 8(d) of the NLRA "was a material breach which justified the subsequent rescission of the contract by the Company." *Marathon Electric* thus deemed it proper to apply the general contract principles of repudiation and rescission to the content of a labor agreement. *See id.* at 341.

Nonetheless, the authorities are divided regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement. *Compare Children's Rehab. Ctr. v. Serv. Employees Int'l Union, Local No. 227*, 503 F.2d 1077, 1079 (3d Cir. 1974) (holding that breach of no-strike clause of labor contract entitled employer to rescind the agreement), *and Boeing Airplane Co. v. Aeronautical Indus. Dist. Lodge No. 751*, 188 F.2d 356, 357 (9th Cir. 1951) (per curiam) (same), *with United Steelworkers of Am. v. NLRB*, 530 F.2d 266, 280 (3d Cir.1976) (holding that union's breach of no-strike clause did not entitle employer to rescind contract because "strict application of the doctrine of material breach derived from contract law is inconsistent with contemporary national labor policy"), *and Trailways of New England, Inc. v. Amalga-*

mated Assn of Street, Elec. Ry. & Motor Coach Employees, 343 F.2d 815, 817 (1st Cir. 1965) (holding that company could not rescind labor contract following union's breach of no-strike clause). Without expressly recognizing this split in the case law, the district court followed the rule of *Marathon Electric* and its progeny by holding that "[t]he principle that a contracting party is released from its obligations if the other party repudiates the contract applies to collective bargaining agreements." *Mulvaney Mech.*, 2000 WL 852430, at *3.

A. *Repudiation by the Union's Strike*

We need not decide today to what extent traditional contract principles of repudiation and rescission apply in the labor context, for we think the district court acted beyond its authority in applying those principles in this case. In *Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80*, 605 F.2d 1290, 1297 (2d Cir. 1979), the employer, as here, attempted to avoid arbitration by claiming that the union had already repudiated the collective bargaining agreement upon which the union relied for arbitration. We held that the issue of whether a party had repudiated the collective bargaining agreement was itself subject to the arbitration clause of the contract, and that the district court had properly deferred resolution of this issue to the arbitrators. *See id.* While it is the province of the courts to decide whether parties to an agreement have actually agreed to arbitrate, once an agreement is found to exist the equitable defense of repudiation generally is reserved for the designated arbitrator. *See Controlled Sanitation Corp. v. Dist. 128 of the Int'l Ass'n of Machinists*, 524 F.2d 1324, 1330-32 (3d Cir. 1976); *see also Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491-92 (1972) (holding that once court determines parties have agreed to arbitrate, arbitrator should determine validity of equitable defense of laches); *cf. Sandvik v. Advent Int'l Corp.*, 220 F.3d

99, 106-07 (3d Cir. 2000) (distinguishing in non-labor context between defenses that render contract void, and those that render it voidable, for arbitration purposes).

Rochdale Village involved a grievance arbitration clause rather than the present interest arbitration clause, *see Rochdale Vill.*, 605 F.2d at 1293, but we discern no principled reason to deviate from our holding that it is the arbitrator's province to rule upon an alleged repudiation. The relevant provision of the interest arbitration clause of the agreement broadly provides that "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of [the] Agreement" shall be submitted to the Board. This language encompasses Local 38's strike, and the consequences thereof, as the work stoppage was precipitated by the failure of the parties to reach accord on a new agreement.

The Seventh Circuit, in a case particularly apposite, held that a claim by an employer that it had repudiated an agreement was subject to the interest arbitration provision contained in that agreement. *See Sheet Metal Workers Local Union No.* 20 v. *Baylor Heating & Air Conditioning, Inc.*, 877 F.2d 547, 551 (7th Cir. 1989), *abrogated on other grounds by Int'l Union of Operating Eng'rs, Local 150 v. Rabine*, 161 F.3d 427, 431 (7th Cir. 1998). As the court persuasively observed in *Baylor Heating*

> The parties agreed to arbitrate "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement." The Company then unilaterally repudiated the agreement and refused to negotiate a renewal. The Company's actions come within the scope of the broad arbitration clause that "clearly and unmistakably" evidences the parties' intent to arbitrate.

Id. We adopt that rule and hold that when, as here, there is a broadly worded interest arbitration clause, the question of

whether an agreement has been repudiated is to be determined by the arbitrator. *Cf. Rochdale Vill.*, 605 F.2d at 1297.

B. *Repudiation During Proceedings*

Throughout its appellate brief, Mulvaney intimates that even if the strike by Local 38 did not serve to repudiate the agreement, the union forfeited its right to arbitrate by representing both before the NLRB and in federal district court that the contract had been terminated. The contention that Local 38's conduct during related administrative and judicial proceedings constituted a repudiation of the union's right to arbitration is also a matter subject to arbitration. *Cf. Flair Builders*, 406 U.S. at 491 (holding that laches defense is for arbitrator to decide).

A number of circuits have fashioned an exception to the general rule that decisions regarding repudiation are for the arbitrator. These courts have reasoned that where the alleged repudiation or, as some phrase it "waiver,"[1] occurred in the midst of proceedings directly before the district court itself, the court need not defer to the arbitrators. *See Reid Burton Constr., Inc. v. Carpenters Dist. Council*, 535 F.2d 598, 603 (10th Cir. 1976) ("Courts must, of course, maintain judicial control of their own proceedings. Such power, we assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of

[1] We have also used the concept of "waiver," which while somewhat similar to repudiation has distinct requirements of its own. *See, e.g., Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 24-25 (2d Cir. 1995). Our waiver line of cases is premised on the notion that a party waived its right to arbitrate by first engaging in protracted litigation or by unreasonably delaying a request for arbitration, which thereby prejudiced its adversary. *See id.* at 25. The employer here maintains that Local 38's denials of the continued vitality of the agreement, standing alone and independent of prejudice, constituted a repudiation of the arbitration provision.

parties before the court."); *see also Cal. Trucking Ass'n v. Bhd. of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275, 1282-84 (9th Cir. 1982) (finding repudiation where union denied for three years in lawsuit that it was bound by collective bargaining agreement before invoking arbitration clause of that agreement); *Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union No. 633*, 671 F.2d 38, 43-44 (1st Cir. 1982) (finding repudiation where neither party requested arbitration during course of proceedings); *Reid Burton Constr., Inc. v. Carpenters Dist. Council,* 614 F.2d 698, 702-03 (10th Cir. 1980) (finding repudiation where union had denied that it was a party to the agreement but asserted arbitration clause as a defense in the proceeding).

These cases are inapposite to the facts in the present case. While the union vacillated regarding the status of the collective bargaining agreement following the strike, its position has remained constant in the instant dispute. Hence, while Local 38 asserted the agreement was terminated both when the Association brought suit before Judge Covello in district court to enjoin the strike, and when it sought certification as the official bargaining representative for the employees before an NLRB hearing officer, in the present matter before Judge Chatigny, the union's position has consistently been premised on the proposition that the Board's jurisdiction was proper because of the continued vitality of the agreement, including the interest arbitration clause.

The prerogative of federal courts to assume jurisdiction when the alleged repudiation occurred in their presence is premised on the view that "[m]aintenance of control and supervision over court proceedings is an inherent judicial function that surely includes the power to determine the validity of equitable defenses arising from the parties' conduct before the court." *California Trucking*, 679 F.2d at 1283. But the objective of preserving the judicial integrity of

the proceedings is not implicated in the instant case, where the alleged repudiation occurred not before the district court itself, but rather in separate tribunals. *See Jones Motor Co.*, 671 F.2d at 43 (discussing repudiation and distinguishing between conduct that occurred prior to filing of complaint and conduct subsequent thereto). The Board is just as qualified as the district court to determine whether Local 38 repudiated its right to arbitrate. Thus, we should defer to its resolution of this issue. *See Local Union No. 370 of the Int'l Union of Operating Eng'rs v. Morrison- Knudsen Co.*, 786 F.2d 1356, 1358 (9th Cir. 1986) (per curiam) (deferring to arbitrator because the alleged acts of repudiation were "not based on conduct that occurred during the proceedings below; they relate to conduct of the parties occurring *prior* to the action to compel arbitration").

Nor do we believe that it would have been appropriate for the district court to have invoked the discretionary doctrine of judicial estoppel. This doctrine precludes a party that successfully maintained a particular position in one legal proceeding, from assuming a contrary position in a later proceeding solely because of a change in interest. *New Hampshire v. Maine*, 532 U.S. 742 (2001). Unlike our immediately preceding discussion of repudiation, judicial estoppel applies when the inconsistent representations occurred in a separate proceeding, *see Adler v. Pataki*, 185 F.3d 35, 41 n. 3 (2d Cir. 1999), including those that occur before an administrative tribunal, *see Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999).

Local 38's vacillations regarding the status of the agreement do not satisfy our judicial estoppel standard. We have held that a party requesting judicial estoppel must demonstrate both that (1) the party against whom estoppel is sought has pursued an inconsistent factual position in an earlier proceeding, and (2) this prior inconsistent position was

somehow adopted by the first court. *United States v. Hussein*, 178 F.3d 125, 130 (2d Cir.1999); *accord AXA Marine & Aviation Ins. (UK) Ltd. v. Seajet Indus. Inc.*, 84 F.3d 622, 628 (2d Cir. 1996). The union's inconsistent representations do not fulfill either of these requirements.

Local 38 has wavered concerning the practical ramifications of the union's strike upon the collective bargaining agreement, but such legal conclusions are not "inconsistent factual positions" as would ordinarily justify judicial estoppel. There is no indication that either Judge Covello, when deciding upon the Association's suit to enjoin the strike, or the NLRB, when reviewing the union's election proceedings, adopted Local 38's position that the agreement had already been terminated. Judicial estoppel is inappropriate without a showing that the prior tribunal adopted the original representations. *See Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1038 (2d Cir. 1993) (holding that a formal settlement between the parties does not provide the necessary level of judicial adoption to justify a finding of estoppel); *see also Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (2d Cir. 1997). As the invocation of the doctrine of judicial estoppel would have been unwarranted, the district court should have deferred to the Board's resolution regarding the agreement's continued vitality.

III Self Perpetuation of Interest Arbitration Clause

The Board's arbitration award directed the company to execute a new 46-month collective bargaining agreement, with this agreement also to contain an interest arbitration clause. Although the district court erred in refusing to confirm the arbitration award, it is directed on remand to vacate the Board's inclusion of a second interest arbitration clause.

An interest arbitration clause is void as contrary to public policy to the extent that it applies to nonmandatory subjects of bargaining, *i.e.*, subjects other than wages, hours and other terms and conditions of employment; this includes the insertion of a successor interest arbitration clause in a new agreement. *See NLRB v. Sheet Metal Workers Int'l Ass'n, Local Union No. 38*, 575 F.2d 394, 398-99 (2d Cir. 1978) (*Elmsford*). We recognize, of course, that the inclusion of a new interest arbitration clause as part of an interest arbitration award leads to self-perpetuation problems, where having agreed to such a provision, a party may find itself locked into having that procedure imposed on it for as long as the bargaining relationship endures. *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161, 1169 (5th Cir. 1976). Were we to condone self-perpetuation, parties would be constrained in their efforts to rid themselves of the interest arbitration clause, as the ultimate decision would rest with the arbitrator, who might have a predilection to again include the clause. *See id.; accord Milwaukee Newspaper & Graphic Communications Union Local No. 23 v. Newspapers, Inc.*, 586 F.2d 19, 21 (7th Cir. 1978) (per curiam).

Since interest arbitration clauses are enforceable only with respect to those disputed contract terms that are mandatory subjects of bargaining, *Elmsford*, 575 F.2d at 398, we will not confirm nonmandatory terms of an interest arbitration award. Our sister circuits have applied this concept to "second generation" interest arbitration clauses, that is, interest arbitration clauses included within an interest arbitration award, and have severed out those clauses while confirming the remainder of the award. *See Local 58, Int'l Bhd. of Elec. Workers v. Southeastern Mich. Chapter, Nat'l Elec. Contractors Ass'n*, 43 F.3d 1026, 1032 (6th Cir. 1995); *Am. Metal Prods.*, 794 F.2d at 1457-58. We take the same common sense approach.

Both the parties' original agreement and the new agreement to be executed pursuant to the Board's award, contain a severability clause, providing that "[i]f, pursuant to federal or state law, any provision of the Agreement shall be found by a court of competent jurisdiction to be void or unenforceable, all of the other provisions of this Agreement shall remain in full force and effect." Because the nonmandatory terms of the Board's award have not been shown to be so fundamental that their absence would nullify the agreement as a whole, *see Sheet Metal Workers' Int'l Ass'n, Local 206 v. R.K. Burner Sheet Metal Inc.*, 859 F.2d 758, 761 (9th Cir. 1988); *see also Local 58, Int'l Bhd. of Elec. Workers*, 43 F.3d at 1032 (relying upon severability clause to excise nonmandatory terms of interest arbitration award), we remand this case to the district court for it to confirm the mandatory provisions of the arbitration award.

CONCLUSION

For the reasons explained above, we vacate the judgment appealed from and remand the case to the district court for the entry of judgment confirming the mandatory terms of the National Adjustment Board's arbitration award and vacating that portion of the award that includes nonmandatory terms.

APPENDIX B

[Filed March 31, 2000]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MULVANEY MECHANICAL, INC.,
Plaintiff,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,
Defendant.

No. 3:98CV1750 (RNC)

RULING AND ORDER

This action involves an arbitration award issued by the National Joint Adjustment Board for the Sheet Metal Industry ("NJAB") requiring plaintiff to execute a collective bargaining agreement with defendant. Plaintiff seeks an order vacating the award on several grounds, but its main argument is that the contract containing the parties' agreement to arbitrate terminated long before the arbitration proceeding commenced and thus the NJAB had no jurisdiction. Defendant seeks an order enforcing the award. Both parties have moved for summary judgment. After careful consideration of the parties' submissions, I agree with plaintiff that the NJAB lacked jurisdiction. Accordingly, plaintiff's motion for summary judgment is granted, defen-

dant's motion for summary judgment is denied, and the award is vacated.

I. Facts

Plaintiff, a sheet metal contractor, was a member of a multi-employer bargaining group ("the Association") that entered into a collective bargaining agreement with defendant ("the CBA"). The CBA was due to expire on June 30, 1997. *See* NLRB Report[1] at 4, 12; Pl.'s Rule 9(c) Statement ¶ 2 (admitted) [doc. # 10]. However, pursuant to an evergreen clause and an interest arbitration clause, the CBA was to remain in effect until negotiations regarding renewal became deadlocked and arbitration failed to produce a binding resolution. *See* NLRB Report at 4-6; 12; Pl.'s Rule 9(c) Statement ¶ 3 (admitted). The interest arbitration clause, which appeared in Article X, Section 8 of the CBA, expressly linked the parties' duty to arbitrate with their promise to not engage in a strike or lockout until the interest arbitration process had run its course. *See* Pl.'s Rule 9(c) Statement ¶ 3 (admitted).[2]

---

[1] "NLRB Report" refers to a report issued by the National Labor Relations Board in connection with an election proceeding involving the parties. *See* Pl.'s Ex. N [doc. # 12]; *see* Pl.'s Rule 9(c) Statement ¶ 19 (admitted) (citing Pl.'s Ex. N). Both parties agree that the findings contained in the NLRB Report must be given preclusive effect. *See* Def's Mem. Supp. Summ. J. at 5-6 [doc. # 15]; Def.'s Reply Mem. Supp. Summ. J. at 2-3 [doc. # 18]; Pl.'s Reply Br. at 1-4 [doc. # 17].

[2] Article X, Section 8 provided in part:

> [A]ny controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:
>
> (a). Should the negotiations for a renewal of this Agreement . . . become deadlocked . . . notice to that effect shall be given to the National Joint Adjustment Board.

In the spring of 1997, the parties met on several occasions for the purpose of negotiating a new agreement. *See id.* ¶ 6 (admitted). On June 19, 1997, defendant threatened a "work stoppage" if a new agreement was not reached. *Id.* ¶ 7 (admitted) (quoting Pl.'s Ex. E). The Association responded by reminding defendant of the interest arbitration provision of the CBA prohibiting strikes while the contract remained in effect. *See id.* ¶ 8 (admitted). On June 25, 1997, defendant notified its members that agreement on a new contract had not been reached and "instructed [them] not to report for work 'effective on or after July 1, 1997' until further notice." *Id.* ¶ 9 (admitted) (quoting Pl.'s Ex. H).

"On July 1, 1997 the Union struck [plaintiff] and several other sheet metal contractors." *Id.* ¶ 10 (admitted). All the union members who were employed by plaintiff went on strike. *See id.* ¶ 11 (admitted). Defendant's president has testified that he thought the CBA's interest arbitration provision was applicable at the time, and that the Union struck despite that provision. *See* NLRB Ruling at 11.

The Association filed an injunction action pursuant to *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), seeking to end the strike until the interest arbitration process had been engaged and completed. *See* Pl.'s Rule 9(c) Statement ¶ 12 (admitted). Defendant opposed the injunction and the Association's application for a restraining order was denied. *See id.*

It is undisputed that the strike was a violation of the CBA's no-strike provision. *See* NLRB Report at 12. In addition, the

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> . . . There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received a written notification of its failure.

Pl.'s Ex. A at 33-34; *see* Pl.'s Rule 9(c) Statement 3 (admitted) (citing Pl.'s Ex. A).

strike was unlawful under Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), because defendant failed to give federal and Connecticut mediation services advance notice of its intention to strike. *See id.* at 6-7, 13-19; Pl.'s Rule 9(c) Statement ¶ 19 (admitted). As a result of that violation, the strikers automatically lost their status as plaintiff's employees. *See* NLRB Ruling at 13-19; 29 U.S.C. § 158(d).

Beginning on July 2, 1997, plaintiff ceased to honor the terms of the CBA. *See* Pl.'s Ex. HH (Brough Aff.) ¶¶ 3-5. It also exercised its right to hire replacement workers outside the provisions of the CBA. *See* Pl.'s Rule 9(c) Statement ¶ 14 (admitted). Nine such workers were hired. *See id.*

During the summer and fall of 1997, the parties met and tried to negotiate a new agreement without success. *See* NLRB Report at 8. At that point, "[defendant] sought to invoke the expired CBA's Article X Section 8 interest arbitration procedure against [plaintiff]." Pl.'s Rule 9(c) Statement ¶ 24 (admitted). It did so by sending a letter to the NJAB dated November 25, 1997. *See* Pl.'s Ex. W; Pl.'s Rule 9(c) Statement ¶ 24 (admitted) (citing Pl.'s Ex. W). The letter read in full: "Due to the fact that negotiations between Sheet Metal Workers' International Association Local Union 38 and Mulvaney Mechanical Inc. have been deadlocked, we are requesting the service of the National Joint Adjustment Board under Article X Section 8." Pl.'s Ex. W.

The NJAB scheduled a hearing for June 30, 1998. *See* Pl.'s Rule 9(c) Statement ¶ 25 (admitted). Plaintiff "objected to the jurisdiction of the NJAB, claiming that it was no longer a party to the CBA nor to its interest arbitration provision after July 1, 1997, due to the [defendant's] unlawful strike." *Id.* 26 (admitted). The NJAB disagreed with that objection and a hearing was held. *See id.*

On July 1, 1998, the NJAB issued a unanimous decision directing plaintiff to execute a forty-six-month collective bargaining agreement with defendant. *See id.* ¶ 30; Def's Rule 9(c)2 Statement ¶ 30. Plaintiff filed an action in state court seeking to vacate the award. Defendant removed the action to this court pursuant to section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185, which gives district courts subject matter jurisdiction over actions to vacate arbitration awards. *See Burns Int'l Sec. Serv., Inc. v. International Union, United Plant Guard Workers of Am.*, 47 F.3 d 14, 16 (2d Cir. 1995).

II. Discussion

Plaintiff contends that defendant's strike served to extinguish the CBA effective July 1, 1997, or gave plaintiff a right to rescind the CBA, which it promptly exercised.[3] In either case, plaintiff argues, defendant lost its contractual right to invoke the CBA's interest arbitration clause well before defendant's letter to the NJAB in late November 1997. Defendant responds that the CBA remained in effect after the strike and plaintiff contractually waived its right to repudiate the CBA.[4]

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[3] In its memorandum of law, plaintiff devotes an entire section to its argument that defendant's conduct excused it from further performance under the CBA. *See* Pl.'s Mem. Supp. Summ. J. at 18-26 (arguing that defendant's repudiation and breach of the CBA gave plaintiff the right to "rescind" the CBA) [doc. # 11]. The court believes that plaintiff's isolated uses of the word "repudiate" (to describe its reaction to the defendant's actions) are inadvertent. *See id.* at 3; Pl.'s Reply Br. at 3.

[4] This is a switch from the position defendant took when it opposed plaintiff's attempt to get an injunction. During the course of the hearing on plaintiff's application, defendant's counsel told Chief Judge Covello: "This contract died and was finished on June 30th, there is no arbitrable dispute, and therefore under *Boys Market* there may not be an injunction. That is really the heart of our case . . ." Pl.'s Ex. K at 12. Chief Judge Covello stated that

The principle that a contracting party is released from its obligations if the other party repudiates the contract applies to collective bargaining agreements. In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l, AFL-CIO,* 370 U.S. 254 (1962), a case involving the arbitrability of an employer's claim for damages based on a union's strike, the Supreme Court stated that "in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important." *Id.* at 262-63. The Court then identified four factors to consider in making this determination: (1) whether the union repudiated its promise to arbitrate; (2) whether the union went on strike; (3) whether the union breached the contract; and (4) whether the employer breached the contract. *See id.* at 263, 265-66.[5]

Each of these factors favors plaintiff's position. The undisputed facts establish that defendant repudiated the CBA's interest arbitration clause, went on strike, and breached the CBA. Defendant does not contend that plaintiff breached the CBA.

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defendant's counsel appeared to be arguing that "this contract ended by reason of its term . . ." *id.* In response to that statement, defendant's counsel said, "Exactly correct, Your Honor. That's our main position in this." *Id.* Also, the parties agree that the NLRB Report held that the CBA was in effect as of July 1, 1997, but that [t]he Hearing Officer did not decide whether the CBA (or [plaintiff's] obligations under it) terminated on July 1, 1997 due to the unlawful strike, as it was not necessary to his decision." Pl.'s Rule 9(c) Statement ¶ 19 (admitted).

[5] In *Drake Bakeries*, the Court held that the employer's claim for damages based on the strike was subject to arbitration. 370 U.S. at 265-66. In so holding, the Court placed great emphasis on the fact that the employer had "not attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the arbitration provisions." *Id.* at 261.

Plaintiff finds further support for its position in the *Marathon Electric* case, *United Elec., Radio & Mach. Workers, Local 1113 v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955). There, a union went on strike in violation of a collective bargaining agreement's no-strike clause. *See Marathon Electric*, 223 F.2d at 341-42. The court of appeals held that the walkout was a material breach justifying the company's rescission of the contract. *See id.* at 341. The court explained:

> It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant case, application of the rule is supported by the rationale underlying such agreements. The prevention of strikes is one of the principal purposes of labor contracts and of the Act. A no-strike provision is "The chief advantage which an employer can reasonably expect from a collective labor agreement."

Id. (footnotes omitted) (quoting S. Rep. No. 80-105, at 16 (1947); *see Dow Chemical Co. v. NLRB*, 636 F.2d 1352, 1362 (3d Cir. 1981) (affirming the logic and need for the *Marathon Electric* rule in the law of labor contracts).[6]

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[6] Plaintiff also finds support for its position in another D.C. Circuit case. In *Boeing Airplane Co. v. NLRB*, 174 F.2d 988 (D.C. Cir. 1949), a union went on strike after negotiations for a new agreement failed. *Id.* at 989. The strike violated a collective bargaining agreement (one that contained evergreen, interest arbitration, and no-strike provisions similar to the ones at issue here) and was initiated without giving the notice required by Section 8(d) of the NLRA. *See id.* at 989-91. In response to the strike, the company refused to recognize the union as the collective bargaining representative of its employees. *See id.* The court held that the union "forfeited all right to be considered as a collective-bargaining agent for the employees of the Company." *See id.* at 991.

Because defendant's conduct gave plaintiff a right to rescind the CBA, the question becomes whether plaintiff exercised that right.[7] Rescission of a contract may be by conduct as well as words. *See* 12 Walter H.E. Jaeger, *Williston on Contracts* § 1469 (3d ed.1970). It is undisputed that plaintiff effectively rescinded the CBA and "substituted its own discretion and Company employment practices and policies." Pl.'s Ex. HH (Brough Aff.) ¶ 5. It stopped making payments under the CBA, hired replacement workers and otherwise acted as though the CBA was no longer in effect. *See supra* Part I. Defendant did not protest. To the contrary, for nearly five months it too acted as though the CBA was a dead letter.[8]

---

[7] Defendant's argument in its reply brief that plaintiff contractually waived a right to repudiate the CBA is unavailing. The part of the CBA defendant relies on, Article XIV, Section 4, states, "Each employer hereby waives any right it may have to repudiate this Agreement." The issue is not whether plaintiff had a right to repudiate the CBA. The issue is whether plaintiff had a right to rescind the CBA after it was repudiated by defendant. "A repudiation is a manifestation by one party to the other that the first cannot or will not perform at least some of its obligations under the contract ... A repudiation may be by words or some other conduct." II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.21 (2d ed. 1998). Defendant manifested an intent not to perform under the interest arbitration clause through its letter to plaintiff threatening a work stoppage, its subsequent strike notice to its members, and the strike itself. *See supra* Part I. Under traditional principles of contract law, defendant's repudiation allowed plaintiff to rescind. *See* II Farnsworth, *supra*, at § 8.20. The parties' waiver of the right to repudiate, contained in Article XIV, Section 4, does not apply to plaintiff's exercise of its right to rescind in response to defendant's repudiation. Moreover, defendant points to no other evidence to support a finding that plaintiff intended to waive its right to rescind in the circumstances at issue here.

[8] Sheet metal workers have been involved in numerous cases addressing the arbitrability of disputes under interest arbitration clauses. *See Beach Air Conditioning & Heating, Inc. v. Sheet*

In sum, defendant repudiated the CBA's interest arbitration clause by eschewing arbitration and going on strike. This entitled plaintiff to rescind the CBA, which it did by its actions after the strike. Because the CBA was effectively rescinded, it was no longer in effect in November 1997 when defendant wrote to the NJAB. Defendant's objection that the NJAB lacked jurisdiction was properly preserved and is well founded.

Accordingly, plaintiff's motion for summary judgment is granted, defendant's motion for summary judgment is denied, and the arbitration award is vacated.

It is so ordered.

Dated at Hartford, Connecticut, this 31st day of March 2000.

/s/_____
Robert N. Chatigny
United States District Judge

Metal Workers Int'l Ass'n, Local 102, 55 F.3d 474 (9th Cir. 1995); *West Coast Sheet Metal, Inc. v. NLRB*, 938 F.2d 1356 (D.C. Cir. 1991); *Sheet Metal Workers Int'l Ass'n Local 110 Pension Trust v. Dane Sheet Metal, Inc.*, 932 F.2d 578 (6th Cir. 1991); *Sheet Metal Workers Local 20 v. Baylor Heating & Air Conditioning, Inc.*, 877 F.2d 547 (7th Cir. 1989), *abrogated on other grounds, International Union of Operating Engineers, Local 150 v. Rabine*, 161 F.3d 427 (7th Cir. 1998); *Sheet Metal Workers' Int'l Ass'n, Local 206 v. R.K. Burner Sheet Metal, Inc.*, 859 F.2d 758 (9th Cir. 1988); *Sheet Metal Workers Local 57 Welfare Fund v. Tampa Sheet Metal Co.*, 786 F.2d 1459 (11th Cir. 1986). Those cases, which defendant does not cite, are distinguishable because none dealt with repudiation and violation of the interest arbitration clause itself.

APPENDIX C

[Filed Aug. 16, 2002]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MULVANEY MECHANICAL,
Plaintiff-Appellee,

v.

SHEET METAL WORKERS,
Defendant-Appellant.

Dkt. No: 00-7546

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of August two thousand two.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Mulvaney Mechanical, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/_____
Arthur M. Heller,
Administrative Attorney

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 6, 2002

Mr. John G. Roberts Jr.
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: Mulvaney Mechanical, Inc.
v. Sheet Metal Workers International
Association, Local 38
Application No. 02A371

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on November 6, 2002, extended the time to and including December 16, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By: /s/
Ruth Jones
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

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Clerk
United States Court of Appeals for
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1702 US Courthouse, Foley Sq.
New York, NY 10007

Supreme Court, U.S.
FILED
FEB 12 2003
CLERK

No. 02-924

IN THE

United States Supreme Court

MULVANEY MECHANICAL, INC.,

Petitioner,

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 38,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY S. DUBIN
Counsel of Record
464 New York Avenue, Suite 100
Huntington, New York 11743
631-351-0300

QUESTIONS PRESENTED

1. Did the Second Circuit properly conclude, in accord with the First, Ninth and Tenth Circuits, that Mulvaney's equitable defense of repudiation could be resolved by the arbitrators, pursuant to the parties agreement to arbitrate.

2. Are the First, Ninth and Tenth Circuit precedents relevant to this case, when, unlike this case, the change in position occurred in the District Court case under review and, unlike this case, the court intervention occurred before, not after, the arbitration proceeding.

3. Is the Second Circuit's decision in this case in accord with this Court's opinion in *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962).

4. Is the Second Circuit's decision in this case in accord with this Court's opinion in *Howsam v. Dean Witter Reynolds, Inc.*, ___ U.S. ___, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).

5. Is the Second Circuit's decision in this case in accord with national labor policy.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption. Pursuant to S.Ct. Rule 29.6, respondent notes that it is an unincorporated association and does not have any corporate affiliations.

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COUNTER STATEMENT OF THE CASE

The Unrelated District Court Case

Petitioner Mulvaney Mechanical, Inc.'s (Mulvaney) Statement of the Case is inaccurate or misleading in several important respects. Petitioner contends that,

> "Local 38 consistently maintained that the expiration of the agreement rendered the entire agreement, including the interest-arbitration provision, a dead letter. The union, in fact, openly repudiated the agreement in federal court just days after the strike commenced." Petition for a Writ of *Certiorari* (PWC), page 6.

This inaccuracy results from petitioner's misunderstanding of what was at issue in the unrelated District Court proceeding. A multi-employer association, not Mulvaney, was seeking an injunction under *Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Respondent, Sheet Metal Workers International Association, Local 38's (Local 38) defense was that a required ingredient for a *Boys Markets, supra*, injunction, a dispute resolving arbitration clause, was absent.

It was missing as Local 38 was not required to continue the multi-employer bargaining unit. It has long been "black letter" National Labor Relations Board (NLRB) law that the continuation of a multi-employer bargaining unit must have the consent of the union and the employers, see *Retail Associates*, 120 N.L.R.B. 388, supplemented 120 N.L.R.B. No. 66A (1958); *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000).

The point is that Local 38 did not, in that unrelated District Court proceeding, repudiate the agreement. Local 38's position was that the interest arbitration provision did not apply to the multi-employer association with whom Local 38 had lawfully decided not to bargain in the future. District Judge Covello obviously agreed with Local 38 as he refused to issue an injunction.

Local 38's Strike

Several of petitioner's statements regarding the strike are either misleading or speculative. Petitioner states that Local 38 thought "that the collective bargaining strength of the multi-employer Association was too strong" and for that reason decided to terminate the multi-employer bargaining unit, PWC, p. 5-6.

Petitioner is engaging in outright speculation. Local 38's reasons for terminating the multi-employer bargaining unit do not appear in the record of the

unrelated District Court case, 3-97-cv-1302 (AVC) (D.C.Ct. 1997), or in the National Labor Relations Board proceeding that certified Local 38 as the exclusive collective bargaining representative of Mulvaney's sheet metal workers, 328 N.L.R.B. 370 (1999). Nor do they appear in the unreported Court of Appeals decision that enforced the NLRB's Order against Mulvaney, 2000 U.S.App. Lexis 29320 (2nd Cir. 2000) or the Court of Appeals decision which Mulvaney attacks in its *Certiorari* Petition, 288 F.3d 491 (2nd Cir. 2002). In fact, the Association was weak, not strong, and Local 38's reasons for ending the bargaining relationship had nothing to do with its strength or lack of it.

Mulvaney misleads the Court when it states that, "Yet by this time - five months after Local 38 first struck - Mulvaney had moved on." PWC, p.8. The implication is that Mulvaney had sustained a devastating five month strike by Local 38. In fact, Local 38 was willing to end the strike after just a few days. However, Mulvaney had decided to take advantage of the situation to become a non-union sheet metal contractor. Mulvaney elected almost immediately to hire permanent replacement workers; to refuse to take back the strikers; to operate as a non-union sheet metal contractor and to pay lower wages and benefits to its sheet metal workers. Mulvaney has benefitted, not endured.

Local 38 did not, as portrayed by Mulvaney, consistently repudiate the agreement. Local 38 took the

position that the agreement was terminated only very briefly during the NLRB representation case administrative proceeding, 34-RC-1517 (NLRB, Reg. 34, 1998). Local 38's position was rejected by the Hearing Officer.

> "Although neither party sought to invoke the interest arbitration provisions at the time the strike began, it would appear from the language of the contract that the provisions were applicable to the parties, including the prohibition on strikes and lockouts until the provisions had been fulfilled."

> "I find that the provisions of Article X Section 8 (the provision requiring arbitration) were clearly applicable to the Employer and to Petitioner (Local 38). Accordingly, although both parties were free to mutually agree to terminate the contract and their relationship, neither party was free to act unilaterally." Both quotations are from p. 12 of the Hearing Officers's Report and Recommendations, dated April 24, 1998, 34-RC-1517 (NLRB, Reg. 34, 1998) found at p. A161, Joint Appendix of the Second Circuit appeal, at issue, Docket No. 00-7546.

Local 38 did not consistently repudiate the collective bargaining agreement or the arbitration clauses contained in the contract. It only did so during the NLRB administrative proceeding and its position was not adopted by the NLRB.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT OF CIRCUITS ON THE QUESTION OF WHETHER THE ARBITRATORS OR THE COURT SHOULD RESOLVE CERTAIN EQUITABLE DEFENSES, SUCH AS REPUDIATION.

In this case, the Second Circuit concluded that Mulvaney's equitable defense of repudiation could be resolved by the arbitrators, pursuant to the parties agreement to arbitrate. The First, Ninth and Tenth Circuits take the same position, but create an exception to this rule when the repudiation occurs in the District Court proceeding that is under review. Since that didn't happen in this case, the Second Circuit was not presented with the question of whether or not it need follow the exception to the rule adopted by the other three Circuits. In short, there is no conflict of Circuits.

Mulvaney points to the Tenth Circuit's decision in *Reid Burton Constr., Inc. v. Carpenters Distr. Council*, 535 F.2d 598 (10th Cir.), cert.den. 429 U.S. 907 (1976). The change in position in that case occurred

within the District Court case under review, not so in this case.

Another distinguishing point of difference between *Reid Burton Constr., supra*, and indeed all of the First, Ninth and Tenth Circuit cases cited by the petitioner and this case, is that in the cited cases the courts were resolving the issue of the obligation to arbitrate before the matters had proceeded to arbitration. In this case, the courts were reviewing the obligation of Mulvaney to arbitrate after the arbitrators had already found that they were empowered to determine the matter. By not moving, in court, to block the arbitration proceeding, Mulvaney was acquiescing in Local 38's decision to have the arbitrators decide their defenses.

Petitioner also points to the Ninth Circuit's decision in *California Trucking Ass'n. v. Board of Teamsters Local 70*, 679 F.2d 1275 (9th Cir.), cert.den., 459 U.S. 970 (1982). Yet, again in this case, the change in position occurred in the District Court case under review. Again, the court intervention occurred before, not after, the arbitration proceeding.

Mulvaney's banner First Circuit case actually supports Local 38's position, *Jones Motor Co. v. Teamsters Local 633*, 671 F.2d 38 (1st Cir.), cert.den., 459 U.S. 943 (1982), although the case involves a union's waiver of arbitration, not an alleged repudiation of the agreement. As in the Ninth and Tenth Circuit

cases, the court intervention occurred before, not after, ny arbitration proceeding. Justice, then First Circuit dge Breyer, spells out why that matters.

> "In these three cases, Flair Builders, General Dynamics, and H. & M. Cake Box, the conduct that allegedly amounted to a waiver or equivalent arbitration bar occurred before the court complaint was filed and involved issues well suited to an arbitrator's expertise (such as what facts occurred or whether those facts, under the contract's standards, should bar arbitration). In contrast, the conduct allegedly constituting waiver here simply consists of a failure to seek arbitration while acquiescing in court resolution of the dispute. These facts took place after the complaint was filed; and the question of whether they amount to waiver calls for the expertise of a judge, not an arbitrator. Moreover, to require that parties go to arbitration despite their having advanced so far in court proceedings before seeking arbitration would often be unfair, for it would effectively allow a party sensing an adverse court decision a second chance in another forum." 671 F.2d 38, 43.

In this case, the events at issue took place "before the court complaint was filed and involved issues well suited to an arbitrator's expertise (such as" did Local 38 repudiate the agreement and did Local 38 repudiate the

arbitration clause. Local 38 did not acquiesce in a court proceeding in place of an arbitration. Further, it is Mulvaney that seeks to have Judge Breyer's "second chance in another forum."

The First Circuit does touch upon the issue of repudiation. It cites its own decision in *H. & M. Cake Box, Inc. v. Bakery Workers Local 45*, 493 F.2d 1226 (1st Cir. 1974) for the proposition that a strike by a union is not a repudiation of the arbitration clause, which would relieve an employer from its duty to arbitrate. 671 F.2d 38, 43.

The Second Circuit's decision in this case is not at odds with those of the First, Ninth and Tenth Circuits. Those Circuits and the Second Circuit have the same basic rule regarding the assertion of certain equitable defenses to the duty to arbitrate. They are to be decided by the arbitrators.

It is also clear that First, Ninth and Tenth Circuit cases selected by the Petitioner are distinguishable from this case on their facts. They all involved changes in position, which occurred in the District Court case under review. They all involved court intervention occurring before, not after, the arbitration proceeding. As the cases are distinguishable, they are not in conflict.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Drake Bakeries

The precedent in this Court that most closely resembles the instant matter is *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962).

In *Drake Bakeries, supra*, the District Court concluded that the union's breach of the no strike clause contained in the collective bargaining agreement was a matter subject to arbitration. A panel of the Second Circuit reversed the District Court, but after an *en banc* rehearing, the Second Circuit affirmed the District Court, 294 F.2d 399. This Court affirmed.

The employer in that case similarly contended that the union's violation of the no strike clause released the employer from its contractual obligations.

> "The company further asserts that even if it agreed in the contract to arbitrate union violations of the no-strike clause, it is excused by the union's breach from pursuing the post-breach remedies called for in the contract. The company does not deny that grievance and arbitration

> procedures under this contract--as is true generally (United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409)--contemplate as a matter of course the arbitration of many alleged breaches of contract. Indeed, central to the company's position is its assertion that the union was bound to arbitrate, rather than strike over, its claim that the company breached the contract by scheduling Saturday work. But in its view, the union's violation of the no-strike clause is sui generis and so basic to what the employer bargained for in the contract and so inherently and 'fundamentally inconsistent with' the grievance and arbitration procedures that the faithful observance of the no-strike clause by the union is a condition precedent to the employer's duty to arbitrate (even though he has promised to do so), or that the union must be deemed to have waived, or to be estopped from asserting, its right to arbitrate." 370 U.S. 254, 260-261, 82 S.Ct. 1346, 1350.

Drake Bakeries' contention was essentially the same as the Employer in this case. The union's breach of the no strike clause is so fundamental a breach of the agreement that Drake Bakeries may repudiate its

obligation to arbitrate. Mulvaney's contention in this case is even broader. Mulvaney contends that Local 38's breach of the no strike clause is so fundamental a breach of the agreement that the Employer may repudiate the contract in its entirety. The Supreme Court rejected this view and stated that:

> "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach." 370 U.S. 254, 262, 82 S.Ct. 1346, 1351.

The District Courts continue to read *Drake Bakeries, supra*, in this fashion.

> "Even where a party ceases to perform its obligations under a contract--and is unjustified in doing so--such nonperformance does not per se amount to a repudiation. Id. at n. 6, quoting 6 Corbin, Contracts § 1443 (1961 Supp., n. 34, pp. 192-193). Cf. Chesapeake and Potomac Telephone Co. v. National Labor Relations Board, 687 F.2d 633, 638 (2d Cir.1982); Abrams v. Carrier Corp., 434 F.2d 1234, 1246- 47 (2d Cir.1970)." *Fraternal Order of Police v. United States Postal Service*, 988 F.Supp. 701, 711 (S.D.N.Y. 1997). Accord: *Forestall, Inc. v. M/V Sersou*,

1998 WL 414935 *3 (S.D.N.Y.).

Admittedly, Drake Bakeries did not seek to terminate the entire contract as has the Employer in this case. However, the Petitioner in this case continued to negotiate with Local 38, even after the July 1, 1997 strike and before the National Labor Relations Board certified Local 38 as the exclusive bargaining representative on October 14, 1998. Thus, both parties did not repudiate the negotiation process under Article X, Section 8 of the collective bargaining agreement. The parties, by their conduct, put this case squarely under the holding of *Drake Bakeries, supra.*

> "Moreover, in this case, under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise." 370 U.S. 254, 261-262, 82 S.Ct. 1346, 1351.

Local 38 and the Employer intended not to repudiate the negotiation and arbitration process contained in Article X, Section 8 of the collective bargaining agreement. Local 38 submitted the negotiation dispute for a determination by the National Joint Adjustment Board of the Sheet Metal Industry (NJAB), as the parties had agreed to do. The NJAB issued an award. The Second Circuit's decision in this case is in complete accord with this Court's decision in *Drake Bakeries, supra.*

Howsam v. Dean Witter

The Second Circuit opinion in this case is also in accord with this Court's recent opinion in *Howsam v. Dean Witter Reynolds, Inc.*, ___ U.S. ___, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). This Court held that an arbitrator, not a court, decides the application of a limitations clause to a Securities Industry arbitration agreement. "[T]he arbitrator should decide 'allegations of waiver, delay or a like defense to arbitrability.' Moses H. Cone Mem. Hosp. supra, at 24-25." 123 S.Ct. 588, 592.

Repudiation is a similar defense that requires the evaluation of an arbitrator. The arbitrator should evaluate whether there has been a repudiation of the agreement and particularly, whether there has been a repudiation of the arbitration clause, as required by *Drake Bakeries, supra.* Arbitrators are better able than judges to interpret the actions of unions and employers

in the context of a labor dispute.

III. THE SECOND CIRCUIT DECISION REFLECTS NATIONAL LABOR POLICY.

> "In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace' (S.Rep. No. 105, 80th Cong., 1st Sess. 17). It was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes' (Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456, 77 S.Ct. 912, 917, 1 L.Ed.2d 972). The preferred method for settling disputes was declared by Congress to be '(f)inal adjustment by a method agreed upon by the parties' (§ 203(d) of the Act, 29 U.S.C. s 173(d), 29 U.S.C.A. s 173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566, 80 S.Ct. 1343, 1345, 4 L.Ed.2d 1403). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing

> influence of the collective bargaining contract in a situation such as this." *Drake Bakeries,* 370 U.S. 254, 263-264, 82 S.Ct. 1346, 1352.

Mulvaney puts forward a doctrine that has the effect of eliminating strike resolution mechanisms. The underlying *rationale* of *Drake Bakeries, supra,* is that strike resolution mechanisms must be preserved, except under the most extreme circumstances. The Second Circuit decision in this case is faithful to that *rationale.*

CONCLUSION

There is no conflict of Circuits on the question of whether the arbitrators or the court should resolve certain equitable defenses, such as repudiation. Further, the current case is distinguishable from the First, Ninth and Tenth Circuit cases offered by petitioner.

The Second Circuit's decision in this case is in accord with this Court's opinions in *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l,* 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962), and *Howsam v. Dean Witter Reynolds, Inc.*, ___ U.S. ___, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).

The underlying *rationale* of *Drake Bakeries, supra,* is that strike resolution mechanisms must be preserved, except under the most extreme circumstances.

The Second Circuit decision in this case is faithful to that *rationale.*

Petitioner's motivation is to be a non-union sheet metal contractor. That position has already been rejected by the arbitrators of the National Joint Adjustment Board of the Sheet Metal Industry, the National Labor Relations Board, and twice more by the Judges of the United States Court of Appeals for the Second Circuit. This Court is urged to leave these determinations undisturbed. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MULVANEY MECHANICAL, INC.,

Petitioner,

-v-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* MECHANICAL CONTRACTORS ASSOCIATION OF CONNECTICUT, INC. AND PLUMBING-HEATING-COOLING CONTRACTORS NATIONAL ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

1. Mechanical Contractors Association of Connecticut, Inc. ("MCAC") is a voluntary organization of unionized mechanical contractors engaged in business in the State of Connecticut. MCAC is an affiliated member of the Mechanical Contractors Association of America ("MCAA"). MCAC represents the interests of its member contractors in collective bargaining and in legislative, judicial and regulatory matters at the local, state and federal level. MCAA represents the interests of mechanical contractors at the national level, and has previously participated as *amicus curiae* before this Court in California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997).

MCAC member contractors are involved in a broad spectrum of mechanical contracting projects throughout the Northeast. Through their membership in MCAC or otherwise, the vast majority of MCAC member contractors are signatory to, or bound by, collective bargaining agreements negotiated with local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("United Association"). These labor agreements contain interest arbitration provisions which are strikingly similar to the interest arbitration clause at issue in Mulvaney Mechanical, Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 288 F.3d 491 (2d Cir. 2002).

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[1]No counsel for either party authored this brief in whole or in part. No entity other than *amici*, its members, or counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters indicating their consent have been filed with the Clerk of this Court.

2. Plumbing-Heating-Cooling Contractors National Association ("PHCC") is a voluntary, national trade organization of plumbing, heating and cooling contractors. It is the oldest trade organization in the construction industry, and is comprised of approximately 3,700 members nationwide. PHCC regularly represents the interests of its member contractors in legislative, judicial and regulatory matters at the federal, state and local level.

PHCC's unionized contractor members are also members of the Union-Affiliated Contractors ("UAC"), a division of PHCC established to represent the special needs, interests and concerns of unionized plumbing, heating and cooling contractors. UAC contractor members are signatory to, or bound by, collective bargaining agreements negotiated with local unions of the United Association. The UAC works to maintain a productive relationship with the United Association and provide member contractors with new, up-to-date national labor agreements and training programs to enhance their competitiveness in the marketplace. These labor agreements typically contain interest arbitration provisions which are similar to the interest arbitration clause at issue in Mulvaney.

The interest arbitration clauses to which MCAC and PHCC contractors are bound provide for interest arbitration before the same dispute resolution body – the Industrial Relations Council for the Plumbing and Pipe Fitting Industry ("IRC"), which is sponsored and maintained jointly by the MCAA, the UAC of the PHCC, and the United Association. The IRC panels which decide interest arbitration cases are comprised of two member representatives from each of the two national trade associations, and four member representatives from the United Association. As a dispute resolution body comprised of contractor and union representatives, IRC is very similar, in terms of its purpose, functioning, and expertise, to the National

Joint Adjustment Board ("NJAB") for the Sheet Metal Industry, the body which imposed the interest arbitration award at issue in Mulvaney.

The Second Circuit panel's opinion in Mulvaney fails to apply the correct legal standards for determining whether contracting parties have agreed to have an arbitrator or a court decide gateway questions of arbitrability. Specifically, the panel incorrectly held that a broadly worded interest arbitration clause contained in a labor agreement requires the arbitrator, not a federal district court, to decide the legal question of whether the union's breach of the agreement's no-strike clause and disavowal of the agreement in related proceedings repudiated the agreement, entitling the employer to rescind the agreement. The Second Circuit panel wrongly concluded, without citation to evidence or authority, that the NJAB was just as qualified as the District Court to decide this highly complex issue of federal labor law – an issue which has divided the Circuit Courts of Appeal, and on which this Court expressly reserved judgment in Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers Int'l, 370 U.S. 254, 265 (1962).

The MCAC and PHCC are uniquely qualified to explain to the Court how interest arbitration in the construction industry really works, and thereby illustrate how the Second Circuit erred in simply concluding that the NJAB was no less qualified than the District Court to decide the dispositive issue of federal labor law upon which the gateway question of arbitrability rests. *Amici* are also uniquely qualified to describe the detrimental impact which the Second Circuit's decision, if allowed to stand, will have on the efficacy of multi-employer bargaining in the construction industry. For these reasons, MCAC and PHCC are especially interested in the questions presented in

the petition for writ of certiorari, and urge the Court to grant the petition.

SUMMARY OF ARGUMENT

Under this Court's precedents including its recent decision in Howsam v. Dean Witter Reynolds, Inc., No. 01-800, 123 S.Ct. 588 (Dec. 10, 2002), a presumption against arbitration applies to gateway arbitrability questions falling within the legal expertise of the federal district courts and beyond the comparative expertise of the arbitration body. In Mulvaney, the threshold arbitrability question required resolution of complex issues of federal labor law: whether Respondent Union repudiated and Petitioner employer rescinded the collective bargaining agreement, thereby terminating the agreement and arbitration clause contained therein as a matter of law, before the Union requested interest arbitration. The broadly worded interest arbitration clause did not clearly and unmistakably evince an intent by the parties to submit this question to the NJAB. Consequently, the District Court, not the Arbitration Board, possessed exclusive authority to decide the question.

The realities of interest arbitration in the construction industry illustrate how the NJAB lacks the qualifications to decide the contract repudiation/rescission issue. Construction contractors and union representatives, not lawyers or retired judges, comprise the NJAB and comparable arbitration boards in the industry. The individual arbitrators' expertise lies in their specialized knowledge of labor market conditions, making them well-qualified to handle the typical interest arbitration, where their duties focus on imposing mandatory terms and conditions of the parties' renewal labor agreement. Legal issues are rarely presented or considered. In fact, in Mulvaney, the record of the NJAB's decision, which was issued the day after the hearing, contains no evidence that the

Arbitration Board even considered the complex issues of federal labor law presented. Instead, it summarily declared its own jurisdiction over the matter, and then proceeded to impose a 46-month collective bargaining agreement on the non-consenting employer.

The Second Circuit's decision, if allowed to stand, will have a significant detrimental impact on labor-management relations in the construction industry. By allowing unions to breach the no-strike clause of a labor agreement, disavow the very existence of that agreement, but later obtain interest arbitration (and a new labor agreement) after the strike fails, the decision will reduce the incentive of employers to enter into multi-employer collective bargaining agreements containing interest arbitration provisions. Unions will not agree to no-strike clauses, and the occurrence of strikes, lockouts and work stoppages could increase dramatically. The effectiveness of multi-employer bargaining in achieving stable labor markets will be diminished. To avoid these harmful results, and their potentially damaging impact on the national economy, the decision below merits review by this Court.

ARGUMENT

I. UNDER THIS COURT'S PRECEDENTS, INCLUDING *HOWSAM*, COURTS MUST APPLY THE ANTI-ARBITRATION PRESUMPTION IN DETERMINING WHETHER PARTIES TO A LABOR CONTRACT AGREED TO ARBITRATE THE LEGAL ISSUES OF CONTRACT REPUDIATION AND RESCISSION.

This case presents the threshold question of whether the "special arbitration-disfavoring presumption", see Howsam, 123 S.Ct. at 593, or the "liberal federal policy favoring arbitration", see Moses H. Cone Memorial Hosp. v. Mercury Constr.

Corp., 460 U.S. 1, 24 (1983), applies in construing a labor contract to determine whether the parties agreed to arbitrate the issues of contract repudiation and rescission. In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), this Court explained the general rule for choosing between the two presumptions: the law presumes "a particular merits-related dispute is arbitrable . . . [as] within the scope of a valid arbitration agreement", id. at 944-45 (internal quotations omitted), but reverses that presumption on the question of who decides arbitrability, so that "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." Id. at 944 (quoting AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)). This general rule of construction applies to both commercial contracts governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., see First Options, 514 U.S. 938, and collective bargaining agreements governed by the Labor Management Relations Act, 29 U.S.C. § 141 et seq., see AT&T Techs., 475 U.S. 643.

In its recent decision in Howsam, this Court acknowledged that a "question of arbitrability" is presumptively "an issue for judicial determination", 123 S.Ct. at 591 (quoting AT&T Techs.), but cautioned that not every "potentially dispositive gateway question" raises a "question of arbitrability" for the court to decide. Id. at 592 ("Linguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits.") The Court proceeded to set forth the standards for determining whether a "gateway question" raises a "question of arbitrability" to which the arbitration-disfavoring presumption applies. Generally, the arbitration-disfavoring presumption applies to circumstances "where contracting parties would likely have expected a court to have decided the gateway

matter," but the arbitration-favoring presumption applies to circumstances "where parties would likely expect that an arbitrator would decide the gateway matter." Id. at 592. More specifically, the law will infer that the parties intended to select a decisionmaker "comparatively more expert" about the matters in dispute, as "it is reasonable . . . for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy – a goal of arbitration systems and judicial systems alike." Id. at 593. Howsam therefore requires an assessment of whether the arbitrator or the court is "comparatively more expert" to decide the "gateway matter" presented. See generally id.

This Court's precedents have distinguished between matters falling within the comparative expertise of labor arbitrators and the courts, respectively. In Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Court observed that "[t]he labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." Id. at 581-82. The expertise of labor arbitrators lies in "settl[ing] disputes at the plant level – disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). Accordingly, the bargaining parties select the arbitrator based on their confidence in his specialized knowledge of industry and shop custom and practice, matters on which "[t]he ablest judge cannot be expected to bring the same experience and competence . . . because he cannot be similarly informed." Warrior & Gulf, 363 U.S. at 582. This specialized knowledge commonly encompasses matters such as wages, hours, seniority, employee benefits, and workplace

safety. See, e.g., Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974).

In addressing arbitrability under section 301 of the Labor Management Relations Act, this Court has routinely held that merits-related disputes are presumptively arbitrable, but the question of who decides arbitrability is not. See, e.g., Warrior & Gulf, 363 U.S. at 583 n.7 ("Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose."); AT&T Techs., 475 U.S. at 651 (anti-arbitration presumption applies to determining whether the parties to a collective bargaining agreement agreed to arbitrate arbitrability, but "it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement."). Thus, the arbitration-favoring presumption applies only to those merits-related disputes within the "greater institutional competence of arbitrators in interpreting collective-bargaining agreements." Id. at 650.

In distinguishing between matters falling within and without the special expertise of labor arbitrators, this Court's precedents establish that the court, not the arbitrator, possesses the exclusive authority to decide pure questions of law, in the absence of a contractual provision clearly and unmistakably reserving such questions for the arbitrator. For example, in Enterprise Wheel & Car, the Court explained that "an arbitrator is confined to interpretation and application of the collective bargaining agreement", and although he may "look[] to 'the law' for help in determining the sense of the agreement", "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." 363 U.S. at 597-98. Conse-

quently, the arbitrator exceeds the scope of his authority where the award "may be read as based solely upon the arbitrator's view of the requirements of enacted legislation". Id. at 597. More recently, in Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1999), the Court explained that "the presumption of arbitrability . . . found in § 301 of the Labor Management Relations Act" applies to union grievances under an existing collective bargaining agreement ("CBA"), but "[t]hat presumption . . . does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*." Id. at 77-78 (emphasis in original). However, the matter of "what federal law requires . . . is not a question which should be *presumed* to be included within the arbitration requirement." Id. at 79 (emphasis in original); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) ("the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land").

The foregoing Supreme Court precedents demonstrate that the Second Circuit panel in Mulvaney erred in blindly applying the arbitration-favoring presumption without assessing whether the Arbitration Board or the District Court was "comparatively more expert" on issues of contract repudiation and rescission as applied to collective bargaining agreements. See Howsam, 123 S.Ct. at 593. Unquestionably, any rational consideration of the law, the facts of record, the realities of interest arbitration in the construction industry, and the policies of the federal labor laws, compels only one possible conclusion: that the District Court possesses vastly greater expertise than the Arbitration Board for deciding the complex legal questions presented. Consequently, it is far more reasonable for the law to presume that the parties expected the District Court to decide these gateway questions.

A. The Federal District Court, Not the Arbitration Board, Possesses the Expertise Necessary To Decide Whether Collective Bargaining Parties Repudiated and/or Rescinded a Labor Contract.

The Second Circuit's application of the arbitration-favoring presumption, rather than the arbitration-disfavoring presumption, was based on its erroneous and unsupported assumption that "[t]he [Arbitration] Board is just as qualified as the district court to determine whether Local 38 repudiated its right to arbitrate." Mulvaney, 288 F.3d at 504. Not surprisingly, the Second Circuit cited nothing to support this baffling conclusion. Id. Had the panel considered the comparative expertise of the two decision-making bodies as applied to the matters in dispute, as this Court's precedents require, see supra, it would have found the Arbitration Board completely unqualified to decide the complex issues of law central to the gateway question of whether the parties were bound by a valid labor contract at the time the Union requested interest arbitration.

The difficult and unresolved nature of the legal issues presented by this gateway dispute demonstrate that it fell far beyond the comparative expertise of the Arbitration Board. Before deferring to the arbitration award, the Second Circuit panel discussed the conflict among the Circuit Courts of Appeals "regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement." Mulvaney, 288 F.3d at 501. The panel acknowledged that this Court's decision in Drake Bakeries "left open the possibility that a strike by a union in contravention of the no-strike clause of an agreement might constitute such a repudiation of the arbitration provision that the employer would be justified in rescinding the entire agreement." Id. However, after surveying the conflicting decisions of the federal Circuit Courts on what is indisputably

a pure issue of law, the panel illogically concluded that the Arbitration Board, rather than the District Court, possessed the exclusive authority to decide the issue in the context of this case. Id. at 502.

The Second Circuit panel erred as a matter of law, contrary to this Court's decisions in AT&T Techs. and Howsam, in holding that "when . . . there is a broadly worded interest arbitration clause, the question of whether an agreement has been repudiated is to be determined by the arbitrator." Id. at 503. The panel ignored the rule of AT&T Techs., that "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator . . . [u]nless the parties clearly and unmistakably provide otherwise". 475 U.S. at 649. Here, a finding that the parties repudiated and rescinded the labor agreement before the Union requested interest arbitration would mean that the agreement was null and void at the time in question – *i.e.*, there was no agreement to arbitrate. Only a court can decide that issue.

Had the panel engaged in the assessment required by Howsam, it would have easily determined that: (1) the District Court possessed the expertise to decide whether and to what extent contract principles of repudiation and rescission apply to the labor agreement between Mulvaney and Local 38, and whether application of those legal principles to the undisputed facts of record compels the conclusion that the labor agreement had terminated as a matter of law before the Union requested interest arbitration; and (2) the Arbitration Board possessed the expertise to decide those matters of wages, benefits, and working conditions implicated in any underlying interest arbitration.

Interest arbitration boards in the construction industry, including the NJAB in this case, consist of equal numbers of

construction contractors and union representatives. The NJAB is established and maintained by agreement between the Sheet Metal and Air Conditioning Contractors' National Association, and the Sheet Metal Workers' International Association. (See Procedural Rules of the National Joint Adjustment Board for the Sheet Metal Industry (2002), at 3, *available at* http://www.smacna.org/products/njab).[2] The NJAB was created "to promote, improve and maintain peaceful labor-management relations by creating this medium for adjudication of locally deadlocked disputes and to discourage strikes, lockouts and work stoppages in the entire sheet metal industry." (Id.)

Amici MCAC and PHCC are in a unique position to address the qualifications and expertise of interest arbitration boards in the construction industry, as PHCC appoints two of the four management members comprising the IRC interest arbitration board, and MCAC is party to a labor agreement providing for interest arbitration before the IRC. The IRC, the NJAB, and other interest arbitration boards in the construction industry are not equipped or qualified to decide issues of law or apply complex legal principles to undisputed facts.[3] Such boards are composed of equal numbers of contractor representatives and union officials. It would be rare to find a panel member who

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[2] Similarly, the multi-employer labor agreement to which *amicus* MCAC is signatory, provides for interest arbitration before IRC, which is sponsored by the MCAA, the UAC of the PHCC, and the United Association. See Statement of Interest, supra.

[3] The District Court's decision in this case was decided on cross-motions for summary judgment, based on undisputed facts. Mulvaney Mechanical, Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, No. 3:98CV1750 (RNC), 2000 U.S. Dist. LEXIS 22125 (D.Conn. Mar. 31, 2000) (Ruling & Order) (reprinted in Appendix B of Petition for Writ of Certiorari, at 25a), rev'd, 288 F.3d 491.

has had any legal training. While individual representatives who serve on construction industry interest arbitration boards have expertise with respect to market conditions in the industry and the needs of contractors and union members – the very issues implicated in interest arbitration – they lack similar qualifications to decide complex legal issues.

The typical construction industry interest arbitration proceeding involves a brief consideration of the market conditions in the relevant geographical jurisdictions, and the needs of the parties, and the board then imposes on the parties a set of mandatory terms and conditions of employment to comprise the essentials of the renewal labor agreement. Legal issues are rarely presented for consideration, and are typically sidestepped.

In the experience of the members of *amici* contractors associations, interest arbitration in the construction industry is much more basic than any process the Second Circuit panel may have contemplated, and is nothing like grievance arbitrations to which courts readily defer. Instead, the typical interest arbitration consists of a very brief hearing. There may be a brief discussion of the most hotly contested economic issues. The parties submit in advance their positions on proposed contract terms they seek and what they are willing to give. In many cases, the arbitration board simply imposes on the parties the same mandatory terms and conditions as those contained in the standard industry association agreement covering the geographical jurisdiction where the parties operate. As the process is so simple, cases are decided with dispatch. Little time is needed for deliberating, weighing the evidence, or articulating any basis of reasoning to support the decision.[4]

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[4] IRC Rules require a final decision within forty-eight (48) hours after close of the hearing.

Such interest arbitration boards act nothing like a court, and cannot provide an adequate or appropriate substitute for judicial resolution of complex legal issues. Cf., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (federal employment claims of non-union employee held presumptively arbitrable, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum"). As experts on labor conditions in the sheet metal industry, the NJAB members unquestionably possess the comparative expertise to decide run of the mill interest arbitration questions such as how much to pay journeymen and apprentice sheet metal workers in Connecticut and Southeastern New York, rules governing overtime and shift work, and how much to contribute to employee benefit trust funds. However, they are generally unfamiliar with legal concepts and principles such as contract repudiation and rescission, and have no qualifications to decide the question left open by this Court in Drake Bakeries.

The federal District Court, not the Arbitration Board, possesses the comparative expertise to consider legal principles of contract repudiation and rescission, and determine whether and to what extent such principles apply to the termination of the collective bargaining agreement in this case. Deciding the repudiation/rescission issue requires a declaration of the law, and application of the law to the undisputed facts of record – tasks well beyond the expertise of construction industry interest arbitration boards. Accordingly, under this Court's arbitrability precedents including Howsam, the arbitration-disfavoring presumption must apply to determining whether parties to a construction industry labor contract agreed to arbitrate the issues of contract repudiation and rescission.

The record below abundantly demonstrates the expertise of the federal District Court, and the lack of any expertise of the

Arbitration Board, to decide the gateway questions presented. The District Court examined the undisputed facts of record, reviewed the applicable case law including this Court's decision in Drake Bakeries, see Mulvaney, 2000 U.S. Dist. LEXIS 22125, at **2-9, and declared the rule of law which would decide the controversy: "The principle that a contracting party is released from its obligations if the other party repudiates the contract applies to collective bargaining agreements." Id. at **8-9. The District Court then compared the facts at bar with the applicable legal authorities, articulated its reasoning, and made the following conclusions of law: the Union repudiated the interest arbitration clause of the collective bargaining agreement (CBA), id. at *10, which gave the employer the right to rescind the CBA, id. at **10-12, and the employer subsequently exercised that right, id. at **12-14, which meant that the CBA was no longer in effect at the time the Union requested interest arbitration, rendering the arbitration award null and void. Id. at *14.

In stark contrast, the record of the interest arbitration proceeding provides no evidence to suggest that the NJAB even considered the legal issues of contract repudiation or rescission. The actual hearing was extremely short, as the Board's agenda shows that it was scheduled to hear eight cases that day. The Board's decision barely exceeds one full page in length. As to the gateway question presented, the decision states only: "A review of the record demonstrated that all procedural requirements had been met and the matter, therefore, was properly before the NJAB for decision." (See Appendix at 1a). The decision was signed on July 1, 1998, ***only one day after the hearing***. (Id.) The Board obviously did not consider the law, or apply legal principles to the facts; it simply declared its own jurisdiction by administrative fiat. Unquestionably, this case constitutes a prime example of why the law presumes contracting parties have not agreed to arbitrate

arbitrability. As this Court recognized in AT&T Techs., allowing a labor arbitrator "the power to determine his own jurisdiction", where the contracting parties have not clearly and unmistakably granted him or her such power, would "undercut[] the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties." 475 U.S. at 651 (internal quotations omitted).

B. The Employer Members of *Amici* Contractors Associations Did Not Agree to Submit the Gateway Questions of Contract Repudiation and Rescission to Arbitration.

Amicus MCAC is the signatory party to a multi-employer collective bargaining agreement containing a broadly worded interest arbitration clause strikingly similar to the clause at issue in Mulvaney, and therefore is especially well-suited to address the bargaining parties' contractual intent with respect to the clause's meaning and scope. The contractor members of both *amici* organizations are subject to labor agreements containing similar clauses, and *amici* believe they are well-qualified to explain employers' expectations as to the meaning of those clauses, and how employers likely will react to the Second Circuit's decision if not reversed by this Court.

Amici contractors associations respectfully submit that their members never believed that by signing a labor contract containing an interest arbitration clause similar to the one in Mulvaney, they were agreeing to let an arbitrator decide whether the parties had repudiated and/or rescinded the contract. Instead, these employers held the common-sense belief that the interest arbitration clause covered just that – interest arbitration. Employers in the construction industry

understand that arbitration boards such as the NJAB and IRC possess the knowledge, specialized experience and expertise to handle effectively and quickly the issues presented in the typical interest arbitration – imposing mandatory terms and conditions of employment consistent with prevailing market conditions. *Amici* members would be surprised to learn that questions of law going to the very existence or termination of the contract would be decided by the interest arbitration panel.

It is a well-accepted fact in the construction industry that employers agree to an interest arbitration clause to avoid the possibility of strikes. Cf., Buffalo Forge Co. v. Steelworkers, 428 U.S. 397, 407 (1976) ("The quid pro quo for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery.") The trade-off is that the employer agrees to be bound by interest arbitration, which can have the effect of perpetuating the contractual relationship between the bargaining parties. See Mulvaney, 288 F.3d at 505. Employers represented by *amici* certainly never believed that a union could be allowed to invoke interest arbitration, and thereby extend the life of an otherwise expired collective bargaining agreement, after breaching the no-strike clause and representing to both the National Labor Relations Board and the U.S. District Court that the underlying labor contract was null and void. No reasonable construction industry employer would have agreed to give an arbitration board the authority to decide its own jurisdiction under such extraordinary circumstances.

As a natural result of the Second Circuit's decision (if allowed to stand), employers will be reluctant to agree to interest arbitration provisions in the labor contracts they negotiate. Unions will then refuse to agree to no-strike clauses. See Boys Markets v. Clerks Union, 398 U.S. 235, 247-49 (1970) (recognizing that allowing union to breach no-strike clause

necessarily dissipates any incentive for employers to enter into labor agreements containing the arbitration/no-strike *quid pro quo*, a result directly contrary to the federal policy favoring settlement of labor disputes by arbitration). As a result, occurrences of strikes, lockouts and work stoppages inevitably will increase, thereby impairing industrial peace. Such a result would be completely at odds with "the national labor policy of peaceful resolution of labor disputes", AT&T Techs., 475 U.S. at 650 (quoting Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 371-72 (1984)), and would disrupt the delicate balance between labor and management which federal labor law seeks to preserve. In sum, federal law and policy compel application of the anti-arbitration presumption to the complex and unresolved legal issues presented by this case.

Applying the correct legal presumption unquestionably would result in a finding that the parties did not agree to submit the contract repudiation/rescission question to the NJAB, since the clause does not clearly and unmistakably reserve that question for the arbitrator. See AT&T Techs., supra. The clause, similar to the clauses to which *amici* members are bound, provides that "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled" by submission of the dispute to the NJAB. Mulvaney, 288 F.3d at 494-95. This clause necessarily contemplates that the parties will continue bargaining pending interest arbitration. The clause cannot apply where the parties, by their actions, have repudiated and rescinded the contract as a matter of law, so that the contract (and the interest arbitration clause therein) has become null and void. Regardless, the clause does not clearly and unmistakably provide that it applies to disputes concerning repudiation and rescission of the contract as a whole. Consequently, the NJAB had no jurisdiction to decide the dispute, and its award should have been held legally null and void.

II. FEDERAL LABOR POLICY REQUIRES COURTS TO RELIEVE EMPLOYERS OF THE CONTRACTUAL OBLIGATION TO ENGAGE IN INTEREST ARBITRATION WHERE THE UNION HAS BREACHED THE NO-STRIKE CLAUSE AND DISAVOWED THE EXISTENCE OF A LABOR CONTRACT.

The Second Circuit's decision could have a severe and detrimental impact on multi-employer bargaining in the construction industry, by allowing unions brazenly to violate a no-strike clause, repeatedly disavow the existence of a collective bargaining agreement when convenient for them to do so, and then reap the benefit of the interest arbitration clause after the strike fails to achieve the sought-after results. Allowing this result could seriously diminish the interest arbitration/no-strike compromise as an effective means of promoting labor stability and industrial peace in the United States. See Buffalo Forge, 428 U.S. at 423-24 (Stevens, J., dissenting) (refusing to ensure enforceability of arbitration/no-strike *quid pro quo*, by allowing strikes in violation of no-strike clauses, "frustrate[s] the more basic policy of motivating employers to agree to binding arbitration"). It would also diminish the effectiveness of multi-employer bargaining. Generally, multi-employer bargaining benefits both the construction industry and the national economy by facilitating agreement on uniform terms and conditions of employment in the industry. Cf., Brown v. Pro Football, Inc., 518 U.S. 231, 240 (1996) ("Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor.") Eliminating the interest arbitration/no-strike trade-off as a viable labor-management compromise would make it much more difficult to achieve uniformity and stability of labor market conditions through multi-employer bargaining, which could have a destabilizing effect on the national economy.

Allowing a union to strike in violation of a no-strike clause, and then reap the benefit of interest arbitration after repudiating the agreement, fundamentally contradicts the policies and principles underlying the federal labor laws. To eliminate uncertainty over this issue and establish a uniform national rule of law to resolve the conflict among the Circuit Courts, this Court should grant certiorari to decide the question left open by Drake Bakeries. By granting certiorari and resolving the issue once and for all, this Court can correct the manifest injustice of Mulvaney and prevent it from spreading any further harm to labor-management relations in this country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: February 14, 2003

Respectfully submitted,

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APPENDIX

Decision of National Joint Adjustment Board for the Sheet Metal Industry, dated July 1, 1998

National Joint Adjustment Board
for the Sheet Metal Industry
P.O. Box 220956
Chantilly, VA 20153-0956

Decision

Sheet Metal Workers' Local 38
P.O. Box 119, Starr Ridge Rd
Brewster, NY 10509

Mulvaney Mechanical, Inc.
275 Keeler Drive
Ridgefield, CT 06877

Issue: Article X, Section 8 Proceeding

Ladies and Gentlemen:

The National Joint Adjustment Board (NJAB) met in New York, New York, on June 30, 1998, to consider the above matter.

Gino J. Columbo, Robert W. Santo and Jeffrey S. Dubin, Esq. appeared on behalf of the Local Union. Charles Brough and Robert S. Mitchell, Esq. appeared on behalf of the Employer.

A review of the record demonstrated that all procedural requirements had been met and the matter, therefore, was properly before the NJAB for decision. NJAB member Joseph Massaro was excused from participation in the matter, and was not involved in the deliberations or the decision.

Based on the record and testimony of the parties, the NJAB rendered the following unanimous decision:

> The parties are directed to execute a forty-six month collective-bargaining agreement, effective July 1, 1998, incorporating the same terms and conditions as are in effect in the building trades collective bargaining agreement and any addenda between signatory Contractors and SMWIA, Local 38, covering portions of New York and Connecticut.
>
> In directing that the new agreement be effective on July 1, 1998, the parties are reminded of the provisions of Article XIV, Section 1 of the Standard Form of Union Agreement, which provides that the previous agreement "... shall continue in force and effect until conferences related thereto have been terminated by either party by written notice, provided, however, that if this agreement contains Article X, Section 8, it shall continue in full force and effect until modified by order of the National Joint Adjustment Board or until the procedures under Article X, Section 8 have been otherwise completed."
>
> Under the Standard Form, that provision, as well as Article X, Section 8, including its prohibitions on strikes and lockouts, remained in full force and effect despite any withdrawal by the employer from multi-employer bargaining, or the refusal of the local union to bargain on a multi-employer basis.

Your attention is directed to the following language contained in Article X, Section 8(a) of the Standard Form Union Agreement.

> The unanimous decision of said Board shall be final and binding on the parties reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached.

BY ORDER OF THE BOARD

s/Arthur Moore
CO-CHAIRMAN

s/Charles D. Corbett
CO-CHAIRMAN

July 1, 1998
DATE

Supreme Court, U.S.
FILED
FEB 25 2003
OFFICE OF THE CLERK

No. 02-924

IN THE

Supreme Court of the United States

MULVANEY MECHANICAL, INC.,
Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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Cases:

AT&T Techs., Inc. v. *Communications Workers*, 475 U.S. 643 (1986) 1,2,3,4

Boeing Airplane Co. v. *Aeronautical Indus. Dist. Lodge No. 751*, 188 F.2d 356 (9th Cir.), *cert. denied*, 342 U.S. 821 (1951) 8

California Trucking Ass'n v. *Brotherhood of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982) 6

Children's Rehab. Ctr., Inc. v. *Service Employees Int'l Union, Local No. 227*, 503 F.2d 1077 (3d Cir.), *cert. denied*, 419 U.S. 1090 (1974) 8

Drake Bakeries, Inc. v. *Local 50, Am. Bakery & Confectionery Workers Int'l*, 370 U.S. 254 (1962) 8,9

First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 2,6

Gateway Coal Co. v. *United Mine Workers*, 414 U.S. 368 (1974) 2

Howsam v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002) ..... *passim*

Jones Motor Co. v. *Teamsters Local No. 633*, 671 F.2d 38 (1st Cir.), *cert. denied*, 459 U.S. 943 (1982) 5,6

Litton Fin. Printing Div. v. *NLRB*, 501 U.S. 190 (1991) 2,3

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Cases:

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 3

Moses H. Cone Mem. Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 4

NLRB v. *Northeast Okla. City Mfg. Co.*, 631 F.2d 669 (10th Cir. 1980) 8

Reid Burton Constr., Inc. v. *Carpenters Dist. Council*, 535 F.2d 598 (10th Cir.), *cert. denied*, 429 U.S. 907 (1976) 6

Trailways of New England, Inc. v. *Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees*, 343 F.2d 815 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965) 8

United Elec. Radio & Machine Workers of Am., Local 1113 v. *NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956) 8

United Steelworkers of Am. v. *NLRB*, 530 F.2d 266 (3d Cir.), *cert. denied*, 429 U.S. 834 (1976) 8

United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 2

IN THE

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MULVANEY MECHANICAL, INC.,
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SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

The union has offered no persuasive reason for this Court to leave unreviewed the Second Circuit's rule—which conflicts with decisions of three other circuits and those of this Court—that an arbitrator, not a court, must make the threshold determination whether there remains an enforceable agreement to arbitrate after one party has clearly and unambiguously repudiated a contract's arbitration provisions. That inquiry, as we demonstrated in the petition (pp.11-20), presents a "question of arbitrability," which "is undeniably an issue for judicial determination." *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986). And this Court's unanimous opinion in *Howsam* v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002), decided just this Term

and after the Court of Appeals issued its opinion below, dispels any doubt that the Second Circuit's decision squarely conflicts with established precedent. That decision warrants this Court's review. At the very least, the petition should be granted, the judgment below vacated, and the case remanded to the Second Circuit for reconsideration in light of *Howsam*.

1. In the petition (pp.16-18), we emphasized that the Second Circuit's rule—that it is for an arbitrator, not a court, to decide whether a party is contractually bound to arbitrate after another party has expressly repudiated the underlying contract—conflicts with this Court's long-standing precedents delineating the roles of courts and arbitrators. We thus quoted this Court's holding in *AT&T* that "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," 475 U.S. at 648 (quotation omitted), and cited three other decisions reaffirming this bedrock principle. *See First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995); *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). So, too, we noted that the inquiry into whether a party is contractually "bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 208 (1991).

The union, however, never even cites—much less comes to grips with—these decisions. And therefore, not surprisingly, it never takes issue with us, nor attempts to explain why the Second Circuit's rule is, in fact, consistent with this Court's precedents. The union's silence is telling. As we argued in the petition (pp.16-17), once a party unambiguously repudiates a contract, the agreement becomes so fundamentally altered that questions about whether the parties remain bound by an original promise to arbitrate must be resolved by a court. That is because this Court's decisions make it abundantly clear that arbitration is "a matter of consent" and may

"not be imposed upon parties beyond the scope of their agreement." *Litton*, 501 U.S. at 201. Since that "question of arbitrability * * * is undeniably an issue for judicial determination," *AT&T Techs.*, 475 U.S. at 649, it is up to the courts—not, as the Second Circuit ruled, the arbitrators—to ensure that compelling the parties to submit to arbitration in the face of one party's unequivocal repudiation would not "operate without regard to the wishes of the contracting parties." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

2. *Howsam* v. *Dean Witter Reynolds, Inc.*, *supra*, decided this Term after the decision below, draws the conflict between the Second Circuit's rule and this Court's precedents into even starker relief. As we explained in the petition (pp.18-20), in *Howsam* this Court unanimously held that the question of who decides a given issue—the court or the arbitrator—is a matter of "align[ing] (1) decisionmaker with (2) comparative expertise." 123 S. Ct. at 593. Under that practical approach, we went on to show that the Second Circuit got it backwards: arbitrators may have expertise on "law of the shop" type issues concerning particular employment practices, customs, or conduct, but it is the judiciary that has far greater institutional competence and expertise resolving legal questions concerning the extent to which a contract is modified or vitiated by one party's unambiguous repudiation.

The union again refuses to join issue. Nowhere in its brief does Local 38 cite the operative language from *Howsam*, nor challenge our contention that, under *Howsam*, the judiciary is the decisionmaker with the superior expertise to resolve such matters. Its silence is wise. As both the petition (p.17) and the brief of amici Mechanical Contractors Association of Connecticut and Plumbing-Heating-Cooling Contractors National Association demonstrate, *see* Br. of Amici 12-13, interest-arbitration panels are comprised largely—if not entirely—of members who lack any legal training or

familiarity with contract law and the doctrines of repudiation and rescission.

What the union eventually does get around to saying about *Howsam*—in all of six sentences—is demonstrably wrong. *See* Opp. 13-14. Local 38 takes comfort entirely in the fact that this Court quoted a previous decision for the proposition that "the arbitrator should decide 'allegations of waiver, delay or a like defense to arbitrability.' " *Id.* at 592 (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Based on this slender reed and its unsubstantiated and wholly conclusory claim that "[r]epudiation is a similar defense that requires the evaluation of an arbitrator," Opp. 13, the union purports to bring the Second Circuit's rule into harmony with *Howsam*.

What the union fails to mention is that, immediately after referring to "allegations of waiver, delay or a like defense to arbitrability," this Court defined these "issues of procedural arbitrability" in such a way as to exclude questions of contract repudiation from their scope. 123 S. Ct. at 592. Quoting from the Revised Uniform Arbitration Act of 2000, this Court clarified that procedural arbitrability issues are limited to "whether *prerequisites* such as time limits, notice, laches, estoppel, and other *conditions precedent* to an obligation to arbitrate have been met." *Id.* (emphases added). Repudiation has nothing to do with whether a party has complied with such procedural prerequisites; rather, it goes to the very substance of the contract: has one party's manifest repudiation effectively vitiated the terms of the parties' agreement so that there is no longer an agreement to arbitrate? Resolving that question is a task clearly reserved for the courts. *See id.* at 591 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is an 'issue for judicial determination * * *.' ") (emphasis in original) (quoting *AT&T Techs.*, 475 U.S. at 649).

The clear conflict between the decision below and this Court's decision in *Howsam* makes this case a good candidate for plenary review. But at the very least, given that the Second Circuit did not have the benefit of *Howsam* at the time it issued its opinion, this Court should grant the petition, vacate the judgment, and remand for further proceedings in light of *Howsam*.

3. The union also tries to sidestep the entrenched conflict between the decision below and the decisions of the First, Ninth, and Tenth Circuits. *See* Opp. 5-8. The only time the union even alludes to the rule adopted by the other circuits is when it offers a lengthy block quote from the First Circuit's decision in *Jones Motor Co.* v. *Teamsters Local No. 633*, 671 F.2d 38 (1st Cir.), *cert. denied*, 459 U.S. 943 (1982). *See* Opp. 7. Yet although the legal rule that then-Judge Breyer articulated is prominently set forth in that quoted passage, its inclusion appears to be entirely accidental; for Local 38 skips past it, focusing instead on the court's unremarkable factual observation that the conduct giving rise to repudiation there "took place after the complaint was filed." Opp. 7 (quoting *Jones Motor Co.*, 671 F.2d at 43). True, but irrelevant. The legal principle Judge Breyer announced in *Jones Motor Co.* had nothing to do with when the repudiator's conduct occurred but rather who—the court or the arbitrator—possessed the requisite expertise to evaluate the conduct and its implications. 671 F.2d at 43. Thus the First Circuit ruled that while some issues—such as "what facts occurred"—are "well suited to an arbitrator's expertise," others—such as the implications of a party acquiescing in litigating its claims or affirmatively disavowing the underlying contract—"call[] for the expertise of a judge, not an arbitrator." *Id.* This, as we pointed out in the petition (pp.14-15, 19), is the same formulation that Justice Breyer announced for the unanimous Court in *Howsam*. The union, however, has shown no interest in addressing the substance of either case.

As for the Ninth Circuit's decision in *California Trucking Ass'n* v. *Brotherhood of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982), and the Tenth Circuit's decision in *Reid Burton Constr., Inc.* v. *Carpenters Dist. Council*, 535 F.2d 598 (10th Cir.), *cert. denied*, 429 U.S. 907 (1976), the union does nothing more than reprise its argument that in those cases "again * * * the change in position [by the repudiators] occurred in the District Court case under review." Opp. 6.[1] But as we explained in the petition (pp.15-16), the rule adopted by these courts cannot be so artificially narrowed in scope. That is because, when one party unequivocally repudiates its contractual duty to arbitrate, the effect is the same, regardless of whether the repudiatory conduct occurred in a parallel proceeding or in a case directly before the district court. Indeed, the Ninth Circuit held without qualification in *California Trucking* that "[o]ne who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party." 679 F.2d at 1283 (quotation omitted). Simply put, whether unambiguous repudiatory conduct "occurred in the District Court case under review," Opp. 6, or in a prior judicial forum, the inquiry into whether an agreement to arbitrate survives repudiation "calls for the expertise of a judge, not an arbitrator." *Jones Motor Co.*, 671 F.2d at 43. Certiorari is warranted to review this conflict among the circuits.

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[1] Virtually out of nowhere, the union suggests during its discussion of these cases that "[b]y not moving, in court, to block the arbitration proceeding, Mulvaney was acquiescing in Local 38's decision to have the arbitrators decide their defenses." Opp. 6. The union is completely wrong. Mulvaney "appeared at the National Adjustment Board's hearing solely to challenge jurisdiction." Pet. App. 8a. Having preserved its objection to the arbitrators' jurisdiction, Mulvaney properly raised that same challenge in the district court when it moved to vacate the award—precisely the same course of action the respondents took in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. at 940.

4. Local 38 elsewhere in its brief seems to suggest that review is unwarranted because the extent of its repudiation is not apparent from the record. That is simply not the case. To begin with, Local 38 itself concedes in its brief that it "repudiate[d] the collective bargaining agreement * * * during the NLRB administrative proceeding." Opp. 5. Nevertheless the union stresses that it "did not *consistently* repudiate the collective bargaining agreement or the arbitration clauses contained in the contract." *Id.* (emphasis added). Our point exactly. The union repudiated the collective bargaining agreement when doing so advanced its interests, but then repudiated its repudiation once it realized greater advantage could be had by tacking to a new course. As explained in the petition (pp.11, 20) and in the brief of amici (pp.19-20), rewarding that sort of opportunistic behavior undermines the good-faith bargaining principles on which labor law is founded, threatens to disrupt the industrial peace that collective bargaining agreements and no-strike clauses are intended to foster, and severely frustrates the need for certainty in connection with large-scale labor issues.[2]

5. Finally, the union never addresses the second questions presented by the petition: whether traditional contract principles of repudiation and rescission apply to collective bargaining agreements. The Second Circuit, as we pointed out in the petition (p.21), recognized that this Court's deci-

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[2] Local 38 also maintains that, while it repudiated the collective bargaining agreement in the district court proceeding, its repudiation was somehow limited to the multi-employer association, not Mulvaney, because the association was the only party to that proceeding. Opp. 1-2. Nevermind that Mulvaney was a member of that very association, the union is wrong on its facts. As we noted in the petition (p.6), the district court action was brought by both the association *and* an individual sheet-metal contractor. The union never explains how it could selectively repudiate the same collective bargaining agreement so that it would bind some sheet-metal contractors but not others.

sion in "*Drake Bakeries* left open" that question. Pet. App. 15a. The court below also acknowledged that, on the open *Drake Bakeries* question, "the authorities are divided regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement." *Id.* 16a. In the petition (pp.22-28), we explained how the Ninth, Tenth, and D.C. Circuits have held that the doctrines of repudiation and rescission apply with full force to collective bargaining agreements,[3] while the First Circuit has taken the opposite view,[4] and the Third Circuit appears to be internally split.[5]

Nowhere does the union cite these cases, much less acknowledge, as the Second Circuit did, that the circuits "are divided" on this important question. Pet. App. 16a. Instead, the union devotes four pages to *Drake Bakeries* in an effort to suggest that there is nothing for this Court to resolve. Opp. 9-12. Yet for all the lengthy quotations set forth in its brief, the one passage the union surprisingly neglects to reproduce is the one that has divided the circuits: "We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the

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[3] *Boeing Airplane Co.* v. *Aeronautical Indus. Dist. Lodge No. 751*, 188 F.2d 356, 357 (9th Cir.), *cert. denied*, 342 U.S. 821 (1951); *United Elec. Radio & Machine Workers of Am., Local 1113* v. *NLRB*, 223 F.2d 338, 341-342 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); *NLRB* v. *Northeast Okla. City Mfg. Co.*, 631 F.2d 669, 677 (10th Cir. 1980).

[4] *Trailways of New England, Inc.* v. *Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees*, 343 F.2d 815, 817 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965).

[5] *Compare Children's Rehab. Ctr., Inc.* v. *Service Employees Int'l Union, Local No. 227*, 503 F.2d 1077, 1079 (3d Cir.), *cert. denied*, 419 U.S. 1090 (1974), *with United Steelworkers of Am.* v. *NLRB*, 530 F.2d 266, 280 (3d Cir.), *cert. denied*, 429 U.S. 834 (1976).

entire contract or to declare its promise to arbitrate forever discharged * * *." *Drake Bakeries, Inc.* v. *Local 50, Am. Bakery & Confectionery Workers Int'l*, 370 U.S. 254, 265 (1962). This is the question the Second Circuit acknowledged was "open," and this is the question on which the circuits remain hopelessly conflicted.

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For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's intervening decision in *Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800 (Dec. 10, 2002).

Respectfully submitted,

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